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No. 74-1560

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

AMADO MARTINEZ-FUERTE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-43a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 44a-45a) was entered on March 5, 1975.

A timely petition for rehearing and suggestion for rehearing *en banc* were denied on April 17, 1975 (App. C, *infra*, pp. 46a-47a). On May 12, 1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including June 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Border Patrol officers, acting pursuant to a judicial warrant issued upon a showing of area-type probable cause, may lawfully stop northbound vehicles at a fixed immigration traffic checkpoint in the Mexican border area in order to make routine inquiries concerning the nationality and immigration status of the occupants of the vehicles.

2. Whether the judicial warrant in this case, assuming that a warrant was necessary to justify the stops, was issued upon an adequate showing of area-type probable cause.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

This case involves three separate prosecutions in the United States District Court for the Southern District of California for offenses relating to the transportation of aliens who were present in this country unlawfully. In each case, the vehicle in which the respondent was traveling was stopped by Border Patrol officers at the permanent immigration traffic checkpoint on Interstate Route 5 near San Clemente, California, and the officers' inquiries concerning the nationality and immigration status of the vehicle's occupants led to the discovery of one or more illegal aliens.

In each case, the checkpoint operations were conducted pursuant to a "warrant of inspection" issued by a United States magistrate on June 22, 1974. The warrant stated that "there is probable cause to believe that mass violations of the Immigration laws of the United States * * * have been and are being committed" at the location of the San Clemente checkpoint (App. A, *infra*, p. 6a, n. 2). It empowered authorized officers of the Immigration and Naturalization Service "to conduct an immigration traffic checkpoint on the northbound lanes of Interstate Route 5, five miles south of San Clemente, California, * * * to stop northbound motor vehicles for the purpose of making routine inquiries to determine the nationality and/or immigration status of the occupants of said vehicles, and * * * to conduct a routine

inspection of said vehicles for the presence of aliens" (*ibid.*).[1]

1. (a) On June 24, 1974, Border Patrol officers, acting pursuant to the warrant, stopped a vehicle driven by respondent Martinez-Fuerte and containing two female passengers. At the secondary inspection area, an officer questioned the occupants concerning their right to be in the United States. Martinez-Fuerte demonstrated that he was a lawful resident alien, but his two passengers admitted that they were citizens of Mexico who were present in this country unlawfully.

Martinez-Fuerte's motion to suppress was denied. After a jury trial, he was convicted on two counts of transporting aliens present in this country unlawfully, in violation of 8 U.S.C. 1324(a)(2). He was sentenced to concurrent terms of three years' imprisonment. The court directed, however, that respondent be confined in a jail-type or treatment institution for six months, that execution of the remainder of the sentence be suspended, and that respondent be placed on probation for a period of five years. He appealed from the judgment of conviction.

(b) Also on June 24, 1974, Border Patrol officers at the San Clemente checkpoint stopped a car driven by respondent Jiminez-Garcia and containing one passenger. Questioning by the officers revealed that

[1] The warrant directed the Immigration and Naturalization Service to file within 10 days a written return on the warrant giving detailed statistics on the operation of the checkpoint during that period (App. A, *infra*, pp. 6a-7a, n. 2).

the passenger was present in the United States illegally. Jiminez-Garcia was charged in a two-count indictment with transporting an alien present in this country unlawfully, in violation of 8 U.S.C. 1324(a)(2), and with conspiring to commit that offense, in violation of 18 U.S.C. 371. The district court granted respondent's motion to suppress the evidence derived from the stop of his vehicle, and the government appealed pursuant to 18 U.S.C. 3731.

(c) On June 28, 1974, Border Patrol officers at the San Clemente checkpoint stopped a car driven by respondent Guillen, in which respondent Medrano-Barragan and his wife were passengers. The officers discovered, upon questioning the occupants, that Medrano-Barragan and his wife were illegally in the country. The officers then searched the car and found three other illegal aliens in the trunk.

Guillen and Medrano-Barragan were jointly indicted on four counts of transporting aliens illegally in this country, four counts of inducing the illegal entry of aliens, and one count of conspiring to commit those offenses, in violation of 8 U.S.C. 1324(a)(2) and (4) and 18 U.S.C. 371. The parties stipulated that the four aliens other than Medrano-Barragan would testify that Medrano-Barragan led them across the border from Mexico clandestinely and that they thereafter entered Guillen's car for the drive north. The district court granted respondents' motions to suppress the evidence derived from the stop of Guillen's car, and the government appealed pursuant to 18 U.S.C. 3731.

It is undisputed that the Border Patrol officers who stopped respondents' vehicles in each case lacked traditional probable cause or founded suspicion in the sense of specific knowledge about the particular vehicle stopped.

2. The three cases were consolidated for argument in the court of appeals. The court ruled, with one judge dissenting, that "the warrant is invalid and that the checkpoint operations which it purports to authorize violate the Fourth Amendment of the Constitution" (App. A, *infra*, p. 2a). The majority held that the warrant was defective because it "is not based on any probable cause or even founded suspicion focussed on any particular individual or vehicle" (*id.* at 19a).

The court rejected as "unsatisfactory" (*id.* at 24a) the area warrant procedure suggested by Mr. Justice Powell's concurring opinion in *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 275-285. The court stated (App. A, *infra*, p. 24a):

> We cannot accept the notion that an area warrant can constitutionally authorize immigration checkpoint operations in the interior of the United States because we think that the analogy to the administrative inspection cases is inapt and because we think that the concept of an area warrant, under these circumstances, is contrary to certain fundamental precepts of the Fourth Amendment, as revealed by its antecedent history.

The majority also stated that "the San Clemente checkpoint does not meet the standards sketched by

Justice Powell in his concurrence in *Almeida*" (*id.* at 33a), because the percentage of automobiles passing through the San Clemente checkpoint that contain illegal aliens is too small, the checkpoint is too far from the Mexican border and lacks "an essential nexus with the border" (*id.* at 34a), and the interference with the traveling public is too great.

Judge Carter dissented. He noted (*id.* at 37a) that the four dissenting Justices in *Almeida-Sanchez*, while disagreeing with Mr. Justice Powell concerning the need for an area warrant, expressly agreed that "such a warrant so issued would satisfy the Fourth Amendment" (413 U.S. at 288). Emphasizing that the cases involved only stops for interrogation and not random searches of automobiles, Judge Carter concluded that the warrant for the San Clemente checkpoint was valid and that the stopping of respondents' vehicles was reasonable under the Fourth Amendment.[2]

REASONS FOR GRANTING THE WRIT

1. This case differs in two respects from the Border Patrol checkpoint cases presently pending before this Court (*United States* v. *Ortiz*, No. 73-2050, and *Bowen* v. *United States*, No. 73-6848). First, the challenged evidence here was in each case discovered

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[2] The court denied the government's petition for rehearing and rejected a suggestion for rehearing *en banc*. It stayed its mandate, however, pending this Court's decisions in *United States* v. *Ortiz*, No. 73-2050, and *Bowen* v. *United States*, No. 73-6848.

as a result of a stop of a vehicle to question the occupants, not as a result of a search of the vehicle's interior for concealed aliens.[3] Second, the stop was made pursuant to a judicial warrant specifically authorizing such stops for purposes of interrogation of the kind undertaken.

The court of appeals' holding—that the checkpoint warrant is constitutionally invalid and that stops

[3] The officers who stopped respondent Guillen's vehicle searched the trunk and found three aliens concealed inside it. That search, however, was conducted only after the officers had first discovered two illegal aliens in the passenger compartment. The search of the vehicle's trunk therefore rests upon traditional probable cause and is not separately in issue here. The court of appeals thus assumed for purposes of its decision that the "discovery [of the aliens in the passenger area] gave probable cause to search the trunk" (App. A, *infra*, p. 7a, n. 3). The court found it unnecessary to decide the issue, "because the parties rest their cases on the validity vel non of the stop made under the inspection warrant" (*id.* at 4a, n. 1).

Similarly, while the warrant authorized the officers "to conduct a routine inspection of said vehicles for the presence of aliens" (*id.* at 6a, n. 2), the Border Patrol did not exercise that authority during the period of the warrant by routinely searching the interior of vehicles. Such searches, under the warrant in this case and under other warrants issued thereafter, were conducted only on the basis of traditional probable cause or with the consent of the vehicle's occupants. The court of appeals accordingly stated that it was "not directly concerned" in this case with the "inspection" authority conferred by paragraph (3) of the warrant, and it did "not consider any argument that the warrant is invalid because paragraph (3) is too broadly drawn" (*id.* at 7a-8a, n. 3). As the court noted, "later renewals of the warrant deleted the authority to 'inspect' and limited agents to the stop and inquiry procedure" (*ibid.*).

made pursuant to the warrant are unlawful—has already had a devastating impact upon the Border Patrol's capacity effectively to enforce the Nation's immigration laws within the jurisdiction of the Ninth Circuit. Since that court had previously held that routine searches [4] or stops [5] of vehicles at Border Patrol checkpoints are unlawful in the absence of a warrant, its holding here has had the effect of altogether prohibiting routine traffic checking operations at the Border Patrol's checkpoints in California and Arizona.[6]

[4] *United States* v. *Bowen*, 500 F.2d 960 (*en banc*), pending on writ of certiorari, No. 73-6848; *United States* v. *Morgan*, 501 F. 2d 1351 (*en banc*).

[5] *United States* v. *Esquer-Rivera*, 500 F. 2d 313; see also *United States* v. *Juarez-Rodriguez*, 498 F. 2d 7.

[6] After the court of appeals issued its decision in this case, the government sought to renew the warrant for the San Clemente checkpoint, and the application was presented to District Judge Turrentine. He concluded, "after due consideration of the results of the previous warrants commencing June 22, 1974, which resulted in the apprehension of 8,591 deportable aliens, * * * that there exists probable cause to operate the checkpoint at this time" (App. D, *infra*, p. 48a). Considering himself bound by the decision in the present case, however, Judge Turrentine felt constrained to deny the application (*ibid.*).

A virtually identical application (set forth at App. F, *infra*, pp. 51a-63a) was then presented to the court of appeals and referred to Circuit Judge Carter. He, too, concluded that "there exists probable cause to operate the checkpoint at this time and to issue a warrant of inspection as attached" (App. E, *infra*, p. 49a). After conferring with Circuit Judge Duniway (who wrote the court of appeals' opinion in the present

Although it is impossible accurately to estimate the additional number of aliens who have entered this country unlawfully as a result of the closing of the Border Patrol's checkpoints in California and Arizona, the substantial deterrent effect of the checkpoints has been completely eliminated, and illegal entrants can now freely travel inland without substantial risk of apprehension through traffic checking operations. The Immigration and Naturalization Service has informed us that there has been a significant increase in the number of deportable aliens apprehended in the central California area through patrol operations other than traffic checks. As we argued in *Ortiz* (Br. 23-26, 30-32; Reply Br. 1-9),[7] the traffic checkpoints in general and the San Clemente checkpoint in particular are essential to the effective enforcement of the immigration laws. Their absence severely impairs the Border Patrol's enforcement efforts.

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case), however, Judge Carter similarly declined to execute the warrant (*id.* at 49a-50a).

Consequently, following the expiration of warrants that were outstanding on the date of the decision in this case, the Border Patrol was compelled to cease routine traffic checking operations at all checkpoints within the jurisdiction of the Ninth Circuit. In the Fifth Circuit, where the court of appeals has approved warrantless, non-probable cause searches of vehicles for aliens at permanent traffic checkpoints (*e.g.*, *United States* v. *Hart*, No. 73-3949, decided January 15, 1975), and in the Tenth Circuit, where the court of appeals has approved warrantless stops for interrogation at checkpoints (*United States* v. *Bowman*, 487 F. 2d 1229), the Border Patrol has continued its checkpoint operations without obtaining judicial warrants.

[7] We have sent respondents' counsel copies of our briefs in *Ortiz*.

2. Our initial contention in this case is that investigative stops of vehicles at checkpoints involve so brief and limited an interference with the legitimate privacy interests of the traveling public that they may lawfully be conducted without advance judicial approval. Our argument here essentially tracks our argument in *United States* v. *Brignoni-Ponce*, No. 74-114, which involves the validity of warrantless *roving patrol* stops for interrogation in the Mexican border area.[8] If we are correct that a warrant is unnecessary for a routine investigative stop of a vehicle at a fixed checkpoint, then this case may be disposed of without reaching the question whether the warrant in this case was properly issued.

Even if such stops would be unreasonable in the absence of a warrant, however, the stops in this case were made following a "prior judicial determination" (*Almeida-Sanchez* v. *United States*, 413 U.S. 266, 284, Mr. Justice Powell concurring) that there was "probable cause to believe that mass violations of the Immigration laws * * * have been and are being committed" at the location of the San Clemente checkpoint (App. A, *infra*, p. 6a, n. 2). While the warrant reflecting that judicial determination is unlike traditional warrants, which are directed at named individuals or identified premises, the enforcement problem that necessitates checkpoint operations is unique, and "it is simply not possible in most cases

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[8] We have furnished copies of our brief in that case to respondents' counsel.

for the Government to obtain specific knowledge that a person riding or stowed in an automobile is an alien illegally in the country" (*Almeida-Sanchez*, *supra*, 413 U.S. at 276-277, Mr. Justice Powell concurring).

In these circumstances, we submit that a showing of area-type probable cause is sufficient for the issuance of a warrant. The warrant sufficiently describes "the place to be searched, and the persons or things to be seized," as required by the warrant clause of the Fourth Amendment, if it identifies the place at which the stops or searches are to be made, the class of vehicles that may be stopped or searched, and the permissible purpose and scope of the authorized intrusion. The warrant in this case was adequate under that standard.

In any event, the significance of the prior judicial approval would not be diminished even if the checkpoint warrant could not be brought within the traditional requirements of a search warrant. The proper analysis, in our view, involves application of the reasonableness standard of the Fourth Amendment, and the question is whether, in light of the prior judicial approval of the checkpoint operations, the investigative stops of the vehicles in this case were reasonable. Even if the magistrate's approval cannot properly be labeled a "warrant," it satisfies the concern expressed in Mr. Justice Powell's concurring opinion in *Almeida-Sanchez*. The "delicate question of constitutional judgment" involved in "a balancing of the legitimate interests of law enforcement with

protected Fourth Amendment rights" was here "resolved by the Judiciary rather than the Executive" (413 U.S. at 284). Accordingly, even if checkpoint stops would be unreasonable without advance approval by a detached and neutral magistrate, no such defect invalidates the stops in this case.[9]

3. Though this case presents issues of obvious importance, the need for plenary review by this Court will depend upon the Court's decisions in *Ortiz*, *Bowen*, and *Brignoni-Ponce*. If the Court upholds the validity of either warrantless checkpoint searches or warrantless roving patrol stops, the checkpoint stops in the present case would presumably be valid *a fortiori*, and this case could be disposed of by vacating the judgment of the court of appeals and remanding the case for further consideration in light of this Court's decisions.

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[9] The court of appeals ruled that "the San Clemente checkpoint does not meet the standards sketched by Justice Powell in his concurrence in *Almeida*" (App. A, *infra*, p. 33a). The considerations relied upon by the court are addressed in our briefs in *Ortiz* (Br. 30-32; Reply Br. 1-9). We note that, during the 10-day life of the San Clemente warrant involved in the present case, Border Patrol officers stopped 820 vehicles for purposes of interrogation and found deportable aliens in 171 (or about 21 percent) of the vehicles stopped (App. A, *infra*, p. 13a). That high ratio was maintained under the renewals of the warrant. In the nine-month period of June 22, 1974, through March 16, 1975 (when the last warrant expired), officers at the San Clemente checkpoint stopped 12,007 vehicles for interrogation and found a total of 8,591 deportable aliens in 2,998 (or about 25 percent) of the vehicles stopped (App. F, *infra*, pp. 56a, 63a).

If the Court rules against the government on both the checkpoint search and roving patrol stop issues, however, then this case would present important unanswered questions that would, in our view, require plenary consideration.

We propose to file a supplemental memorandum in this case stating our views concerning its proper disposition after *Ortiz*, *Bowen*, and *Brignoni-Ponce* are decided.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-2462

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

AMADO MARTINEZ-FUERTE, DEFENDANT-APPELLANT

No. 74-2680

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

JOSE JIMINEZ-GARCIA, DEFENDANT-APPELLEE

No. 74-2714

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

RAYMOND RANGEL GUILLEN,
FERNANDO MEDRANO-BARRAGAN,
DEFENDANTS-APPELLEES

[March 5, 1975]

On Appeal from the United States District Court for the Southern District of California

Before: DUNIWAY and CARTER, Circuit Judges, and WEIGEL,* District Judge.

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* The Honorable Stanley A. Weigel, United States Judge for the Northern District of California, sitting by designation.

OPINION

DUNIWAY, Circuit Judge:

These consolidated appeals question the constitutionality of stops and immigration inspections, without probable cause or founded suspicion, of vehicles passing through the San Clemente traffic checkpoint, as operated by the United States Border Patrol under an inspection warrant issued by a United States magistrate. We hold that the warrant is invalid and that the checkpoint operations which it purports to authorize violate the Fourth Amendment of the Constitution.

I. *The Facts.*

A. *The Three Appeals.*

1. *No. 74-2462, Martinez-Fuerte.*

Martinez-Fuerte appeals from a conviction of transporting "illegal" aliens in violation of 8 U.S.C. § 1324(a)(2). On June 24, 1974, in Tijuana, Mexico, two Mexican women met an unidentified man who promised to take them into the United States in return for their promises to pay him $200 each once they started working. Using false papers provided by the man, the two women entered the United States at the port of entry at San Ysidro, California. From there, according to the man's instructions, the women traveled by bus to San Diego, where they again met the man and returned the false papers to him. He directed them to Martinez-

Fuerte's car. Without asking his passengers where they were going, Martinez-Fuerte drove north towards Los Angeles along Interstate 5.

At approximately 8:00 p.m. on June 24, they reached the San Clemente checkpoint. There they were stopped by border patrol agents acting under a "warrant of inspection" issued by a United States magistrate on June 22, 1974. Martinez-Fuerte was instructed to drive off the highway to a secondary inspection area where an agent questioned him and his two passengers about their rights to be in the United States. Martinez-Fuerte, an immigrant, was lawfully within the country and so demonstrated with appropriate identification. However, in response to the agent's inquiry, the two female passengers admitted being citizens of Mexico, illegally within the United States. Martinez-Fuerte was then arrested and charged with transporting "illegal" aliens, i.e., those unlawfully in this country.

Before trial he moved to suppress all evidence derived from the stop and detention, at the checkpoint on the grounds that the stop was made without founded suspicion, probable cause, or valid warrant. On appeal, he challenges his conviction by arguing that this pre-trial motion, which was denied, should have been granted.

2. *No. 74-2680, Jiminez-Garcia.*

Also on June 24, 1974, Jiminez-Garcia, driving a 1968 Chevrolet, was stopped and detained at the San Clemente checkpoint. There agents discovered

that his passenger was an "illegal" Mexican alien. The passenger had made arrangements with an unknown person in Tijuana to be smuggled into the United States and transported to Los Angeles. Earlier on the day of the stop, the alien had been guided across the border to a certain residence in San Ysidro, where he stayed for a short time before meeting Jiminez-Garcia for the trip north. Jiminez-Garcia was charged with transporting an "illegal" alien in violation of 8 U.S.C. § 1324(a)(2) and conspiracy to transport an "illegal" alien in violation of 18 U.S.C. § 371. The trial court granted his motion to suppress, and the government appeals.

3. *No. 74-2714, Guillen.*

On June 28, 1974, a border patrol agent stopped the car which Guillen was driving in the company of Medrano-Barragan and the latter's wife. Upon inquiry the agent learned that the two passengers were "illegal" aliens. Guillen was a United States citizen. Agents then searched the car and discovered three more "illegal" aliens in the trunk.[1] Medrano-Barragan had led the other aliens across the border

[1] It is not clear whether the inspection warrant purports to authorize searches beyond a mere "stop" and inquiry into the immigration status of the persons in the car. Presumably, however, in this case the agents either had obtained Guillen's consent to the search of the trunk or had probable cause to search based on the presence of two "illegal" aliens in the passenger area of the car. We need not decide that issue, however, because the parties rest their cases on the validity vel non of the stop made under the inspection warrant.

at the beach near Tijuana, Mexico, and to a highway in the United States where they piled into Guillen's car for the drive north. Guillen and Medrano-Barragan were charged with inducing illegal entry of aliens in violation of 8 U.S.C. § 1324(a)(4), transporting "illegal" aliens in violation of 8 U.S.C. § 1324(a)(2), and conspiracy, in violation of 18 U.S.C. § 371. The trial court granted defendants' motion to suppress, and the government appeals.

B. *The Warrant of Inspection.*

The focal point of these appeals is the "warrant of inspection" which the government sought and obtained from a United States magistrate on June 22, 1974, to "authorize" the continued operation of the San Clemente immigration traffic checkpoint shortly after recent decisions of this court had sharply curtailed border patrol authority to search or stop passing vehicles at that checkpoint. The warrant, which is set out in full in the margin,[2] concludes

[2] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HON. EDWARD A. INFANTE)

MISC. 377

IN THE MATTER OF AN APPLICATION BY THE UNITED STATES OF AMERICA FOR AN INSPECTION WARRANT FOR THE IMMIGRATION AND NATURALIZATION SERVICE TO OPERATE A FIXED TRAFFIC CHECKPOINT ON INTERSTATE ROUTE 5 FIVE MILES SOUTH OF SAN CLEMENTE, CALIFORNIA

WARRANT OF INSPECTION

TO: Any authorized officer of the Immigration and Naturalization Service including any agent of the U.S. Border patrol:

Application having been made by the United States for a warrant of inspection for the operation of a fixed checkpoint at San Clemente, California, and having reviewed and considered the affidavits of Robert D. McCord and Richard Wischkaemper, and having reviewed and considered the findings made by the United States District Court in *United States* v. *Baca*, 368 F.Supp. 398 (S.D.Cal. 1973) and having reviewed and considered a copy of the certified reporter's transcript of the sworn testimony of Deputy Chief Border Patrol Agent Richard E. Batchelor presented in the *Baca* case,

I am satisfied that there is probable cause to believe that mass violations of the Immigration laws of the United States (Title 8, United States Code) have been and are being committed at a point known as the Border Patrol checkpoint on the northbound lanes of Interstate Highway Route 5, approximately five miles south of San Clemente, California.

Wherefore, YOU ARE HEREBY COMMANDED:

(1) to conduct an immigration traffic checkpoint on the northbound lanes of Interstate Route 5, five miles south of San Clemente, California, and;

(2) to stop northbound motor vehicles for the purpose of making routine inquiries to determine the nationality and/or immigration status of the occupants of said vehicles, and;

(3) to conduct a routine inspection of said vehicles for the presence of aliens, and;

(4) since the flow of alien traffic occurs at all hours of the day, and since limited operation of the traffic checkpoint would tend to defeat its purpose, the operation of this checkpoint may be conducted at any time of day or night, and;

(5) a copy of the warrant shall be displayed in a conspicuous manner at the checkpoint location and upon request, shall be given to any person detained.

(6) The Immigration and Naturalization Service shall file a written return on this warrant containing the following:

A. The approximate number of vehicles passing through the checkpoint during the hours of operation;

B. The approximate number of vehicles stopped for questioning concerning citizenship status;

C. The number of vehicles inspected;

D. The number of vehicles in which aliens were discovered;

E. A recapitulation of the total number of deportable aliens apprehended;

F. An inventory of any property seized.

(7) This warrant shall be returned within ten days of this date, as required by law.

Dated this 22nd day of June, 1974.

/s/ Edward A. Infante
United States Magistrate

that there is "probable cause" to believe that mass violations of the immigration laws are committed at the San Clemente checkpoint and therefore *commands* the border patrol to conduct an immigration traffic checkpoint, stopping northbound vehicles to make routine inquiries to determine the immigration status of the occupants. At issue here is the constitutionality of this stop and inquiry procedure.[3]

[3] Paragraph (3) of the warrant purports to authorize agents "to conduct a routine inspection of said vehicles for the presence of aliens." In the jargon of the border patrol "inspection" is often a euphemism for search (see the reporter's transcript in the *Baca* case referred to in the warrant at 202-08, 331-32), and the government presumes that paragraph (3) would authorize searches of trunks and other places where aliens could be concealed (government's brief in No. 74-2462 at 43). However, the government asserts that no search of an automobile interior was conducted under this warrant without the driver's consent. In any event, in each of the appeals now before us, the border patrol discovered aliens without going beyond the "routine inquiry" authorized by paragraph (2), and we are not directly concerned with paragraph (3), although it is true that in No. 74-2714 the trunk of Guillen's car was opened after two "illegal" aliens were discovered in the passenger area. We assume that that discovery gave probable cause to search the trunk. But if the discovery violated the Fourth Amendment, the later search can fare no better. In view of our holding that paragraphs

We make two further observations about the warrant. First, although the warrant is limited in duration to ten days, it has been renewed 26 times for ten-day periods. (San Francisco Examiner, February 25, 1975, page 6.) The particular warrant before us, then, was by no means a temporary measure; it was simply the first installment in what appears to be a perpetual succession of similiar warrants. Second, although the warrant incants the words probable cause, there is no claim that there existed probable cause in the traditional sense of articulable, individuating circumstances which would lead a reasonable agent to believe that "illegal" aliens were in any particular vehicles. In each case the government has stipulated that there was neither probable cause nor founded suspicion for the stop. The government relies solely on the inspection warrant to justify the stops and inquiries.

C. *Operation of the Checkpoint.*

We have in the record before us only summary accounts of the three stops involved in the instant appeals. But to decide the validity of the inspection warrant and the checkpoint operations it authorizes, we must also consider the routine procedures to

(1) and (2) contravene the Fourth Amendment, we do not consider any argument that the warrant is invalid because paragraph (3) is too broadly drawn. We do note, though, that later renewals of the warrant deleted the authority to "inspect" and limited agents to the stop and inquiry procedure. *E.g.*, Warrants of the District Court for the Southern District of California Nos. 408, July 11, 1974, and 420, July 29, 1974.

which innocent ordinary travelers are subjected. To that end, counsel have supplemented the record in these cases with the official reporter's transcript of hearings held in the Southern District of California to assess the impact of *Almeida-Sanchez* v. *United States*, 1973, 413 U.S. 266, on the checkpoint operations. *United States* v. *Baca*, S.D. Cal., 1973, 368 F.Supp. 398, summarizes the findings made after those hearings. In issuing the inspection warrant which is now before us, the magistrate expressly relied on the *Baca* court's findings and on the reporter's transcript in that case. We have reviewed that transcript[4] as well as the records in the instant appeals to help us understand what goes on at San Clemente checkpoint.

Although the San Clemente checkpoint has been the subject of previous cases before this court,[5] we think it important to summarize here just how the checkpoint works. As the enforcement arm of the Immigration and Naturalization Service, the border patrol operates what it calls a permanent fixed immigration checkpoint on Interstate 5 near San Clemente. Actually the checkpoint is five miles south of San Clemente at San Onofre, between San Onofre State Beach on the west and Camp Pendleton Marine Base on the east. The checkpoint is 62 miles by air

[4] Hereafter cited as "*Baca* R.T."

[5] *E.g.*, *United States* v. *Morgan*, 9 Cir., in banc, June 14, 1974, 501 F.2d 1351; *United States* v. *Brignoni-Ponce*, 9 Cir., in banc, June 14, 1974, 499 F.2d 1109; *United States* v. *Juarez-Rodrigues*, 9 Cir., May 21, 1974, 498 F.2d 7.

and 66 miles by road from the international border with Mexico. *Baca*, *supra*, 368 F.Supp. at 410. Interstate 5 is an eight lane freeway, the principal highway connecting California's two largest cities, Los Angeles and San Diego. The route is heavily traveled. According to the affidavit of Robert D. McCord submitted in support of the application for the inspection warrant, on the average 1200, and at peak times over 2500, cars pass through the checkpoint per hour. Clerk's Record in No. 74-2462 at 91, 93. Simple multiplication of the hourly average reveals that over ten and one-half million cars pass the checkpoint in a year. The overwhelming majority of persons traveling north through the checkpoint are lawfully within the country; indeed, most of them are not aliens and have not crossed the border at all.

When in operation, the checkpoint operates as a roadblock causing all northbound vehicles, which are generally traveling at freeway speeds, to slow or come to at least a "fleeting stop" for an immigration check. *Baca*, *supra*, 368 F.Supp. at 411, 415. The *Baca* court described the physical layout of the checkpoint as follows:

> Approximately one mile south of the checkpoint is a large black on yellow sign with flashing yellow lights over the highway stating "ALL VEHICLES, STOP AHEAD, 1 MILE." Three-quarters of a mile further north are two black on yellow signs suspended over the highway with flashing lights stating "WATCH FOR

> BRAKE LIGHTS." At the checkpoint, which is also the location of a State of California weighing station, are two large signs with flashing red lights suspended over the highway. These signs each state "STOP HERE—U.S. OFFICERS." Placed on the highway are a number of orange traffic cones funneling traffic into two lanes where a Border Patrol agent in full dress uniform, standing behind a white on red "STOP" sign checks traffic. Blocking traffic in the unused lanes are official U.S. Border Patrol vehicles with flashing red lights. In addition, there is a permanent building which houses the Border Patrol office and temporary detention facilities. There are also floodlights for nighttime operation. 368 F.Supp. at 410-11.

The officer at the "point" (between lanes of traffic) surveys the oncoming cars, looking for those which in border patrol parlance "break the pattern" of the traffic. *Baca*, *supra*, 368 F.Supp. at 406. Sometimes border patrol agents stationed further south along the highway have by radio alerted the agent at the "point" to give special scrutiny to a particular approaching vehicle. *Baca* R. T. 202. In any event, the agent at the "point" makes a purely discretionary decision whether to wave each auto through the checkpoint after it has slowed or come to a "fleeting stop." *Id.* If for some reason a vehicle arouses the officer's suspicion, he will divert it to a secondary inspection area where the travelers will be detained for inquiry by other agents into their citizenship and immigration status. *Id.*; *Baca*, *supra*, 368 F.Supp. at 406-07.

Ideally the border patrol would like to operate the checkpoint every day around the clock. *Baca* R.T. 177, 293. Historically, however, the border patrol has operated the San Clemente checkpoint for only 65 to 70 percent of the time. *Baca, supra*, 368 F.Supp. at 410. Inclement weather and peak traffic make the checking operations hazardous, and the border patrol often voluntarily closes the checkpoint.[6] At other times manpower shortages may force the border patrol to suspend checking. The checkpoint requires at least five officers when traffic is light and seven to eight when traffic is heavier. *Baca* R.T. 431. During the roughly eight-day period of checkpoint operations summarized by the return on the instant warrant of inspection, the border patrol operated the San Clemente checkpoint for only about 124 hours out of 199 total hours, or slightly under two-thirds of the time. (Clerk's Record in No. 74-2462 at 75.)

As required by the magistrate's order, the return on the warrant of inspection provides a statistical summary of checkpoint activity. From 4:00 p.m. on June 22, 1974, through approximately 11:00 p.m. on June 30, an estimated 145,960 vehicles passed through the San Clemente traffic checkpoint during the 124

[6] The border patrol does, however, maintain a 24 hour check on all buses passing through the checkpoint to ascertain the citizenship of the passengers. *Baca* R.T. 187. The validity of this procedure is not before us. Furthermore, the border patrol frequently maintains a traffic observation post with agents positioned in a car along the road to look for suspicious vehicles when the checkpoint is closed. *Id.* at 372. *See e.g., Brignoni-Ponce, supra.*

hours and ten minutes of checking operations. We may assume that all of these cars were forced to interrupt their normal progress and slow to or nearly to at least a momentary halt for scanning by the officer at the "point." Of these, 820 vehicles were referred to "secondary" for questioning regarding nationality and citizenship. Of those diverted to secondary, 202 vehicles were "inspected," whatever that means. Border patrol agents found deportable aliens in "plain view" in 169 of the 202 vehicles. In 33 cases, all allegedly with the consent of the drivers, agents searched portions of the vehicles in which "illegal" aliens could be secreted. In only two of these 33 searches, agents found deportable aliens. In all, 725 deportable aliens were found in 171 vehicles as a result of checkpoint operations during the eight-day period. Affidavit of Gene E. Harris, the border patrol agent in charge of the San Clemente checkpoint, Clerk's Record in No. 74-2462 at 75-76, 79.

These border patrol statistics reveal that of the 145,960 vehicles passing through the checkpoint, only 171, or 0.12 percent, were found to contain deportable aliens. To be sure, it is possible that other "illegal" aliens, well camouflaged to avoid "breaking the pattern" of traffic, seeped through the checkpoint strainer, but there is no record of this. We doubt that there were many because the border patrol was "overzealous" by a factor of nearly five in diverting cars for secondary inspection. Of 820 cars diverted, 649 had no "illegal" aliens in them.

II. *The traffic immigration checkpoint operated under the inspection warrant is unreasonable under established constitutional standards.*

A. *Almeida-Sanchez and the cases that follow it forbid warrantless checkpoint operations.*

The cases now before us bring us to the logical, and predictable, next step in the development of search and seizure doctrine under *Almeida-Sanchez* v. *United States*, 1973, 413 U.S. 266, and its progeny in this circuit. In *Almeida* the Supreme Court held unreasonable a roving patrol immigration stop and search of an automobile where border patrol agents had neither probable cause nor a warrant. The Court did not decide the validity of temporary or permanent fixed checkpoint immigration searches. That question came before us in *United States* v. *Bowen*, 9 Cir., in banc, May 9, 1974, 500 F.2d 960, *cert. granted*, Oct. 15, 1974, 43 U.S.L.W. 3208, where we held that, in light of the principles enunciated in *Almeida*, fixed checkpoint searches conducted without probable cause also violate the Fourth Amendment.

Both *Almeida* and *Bowen* dealt with full searches, while the cases now before us involve a somewhat less intrusive stop and inquiry procedure. However, a stop of an automobile invokes Fourth Amendment protection. *United States* v. *Larios-Montes*, 9 Cir., July 11, 1974, 500 F.2d 941, 943. *See Terry* v. *Ohio*, 1968, 392 U.S. 1, 16. Although we have frequently upheld automobile stops made on less than probable cause, we have also held that the Fourth Amendment

requires that such stops be justified by articulable facts and circumstances which support the conclusion that the intrusion was not unreasonable. *United States* v. *Mallides*, 9 Cir., 1973, 473 F.2d 859, 861. The minimal requirement to authorize a stop of a car is a founded suspicion. *United States* v. *Larios-Montes*, *supra*; *United States* v. *Jaime-Barrios*, 9 Cir., 1974, 494 F.2d 455, *cert. denied*, 94 S.Ct. 3178; *United States* v. *Ward*, 9 Cir., in banc, 1973, 488 F. 2d 162; *United States* v. *Bugarin-Casas*, 9 Cir., 1973, 484 F.2d 853, *cert. denied*, 1974, 414 U.S. 1136; *Wilson* v. *Porter*, 9 Cir., 1966, 361 F.2d 412.

In *United States* v. *Juarez-Rodriguez*, 9 Cir., May 21, 1974, 498 F.2d 7, we held that even "routine" stops at the San Clemente checkpoint require a founded suspicion.[7] In *United States* v. *Brignoni-Ponce*, 9 Cir., in banc, June 14, 1974, 499 F.2d 1109, *cert. granted*, October 15, 1974, 43 U.S.L.W. 3208, we held that a roving patrol-type stop conducted by border patrol agents at the San Clemente checkpoint, while the checkpoint itself was not in operation, violated Fourth Amendment standards because it was not based on a founded suspicion.

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[7] We have recently held that mere diversion of a moving automobile through a zone (a traffic checkpoint) where border patrol agents could see in plain view two aliens lying on the floor behind the front seat does not violate any constitutionally protected expectation of privacy. *United States* v. *Evans*, 9 Cir., Oct. 23, 1974, 507 F.2d 879 (Nos. 74-2095 and 74-2096). *Evans* did not involve a stop and did not, therefore, address the constitutionality of the stop, detention, and inquiry procedure at issue here.

Of course, neither *Almeida* nor our decisions interdict warrantless and causeless searches and seizures at the border or its functional equivalent. Although the district court in *Baca, supra*, concluded that the San Clemente and all other fixed checkpoints in California were functional equivalents of the border, we have since overruled that conclusion. *United States* v. *Esquer-Rivera*, 9 Cir., July 1, 1974, 500 F.2d 313 (Ocotillo checkpoint); *United States* v. *Morgan*, 9 Cir., in banc, June 14, 1974, 501 F.2d 1351 (San Clemente checkpoint); *United States* v. *Bowen, supra* (State Highway 86 checkpoint).

Almeida and the cases it has sired in this circuit thus establish a clear doctrinal background for the three cases now before us. The requirements of the Fourth Amendment apply with full vigor at immigration checkpoints. A stop, even a "fleeting stop," is subject to Fourth Amendment protections. At least absent a warrant, the border patrol must have a founded suspicion to stop a vehicle at a checkpoint and probable cause to search it. As the government concedes, under our decisions and absent a valid warrant the border patrol cannot continue its checkpoint operations.

B. *The inspection warrant does not legitimize the checkpoint operations.*

The issue here is whether the warrant of inspection somehow transforms otherwise unreasonable seizures into constitutional ones.[8] We now hold that it does

[8] The government tenaciously maintains that 8 U.S.C. § 1357(a) and 8 C.F.R. § 287.1 authorize its checkpoint operations, but that argument is foreclosed by *Almeida, Bowen,* and *Brignoni, supra.*

not. We adhere to the principles announced by the Supreme Court in *Carroll* v. *United States*, 1925, 267 U.S. 132, which involved the search for and seizure of contraband liquor by prohibition agents and which we paraphrase as follows:

> It would be intolerable and unreasonable if a [border patrol] agent were authorized to stop every automobile on the chance of finding ["illegal" aliens] and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband [,] illegal merchandise [, or "illegal" aliens].

Id. at 153-54. *Accord, Almeida, supra*, 413 U.S. at 274-75; *Bowen, supra*, 500 F.2d at 963; *Brignoni, supra*, 499 F.2d at 1111.

Federal agents cannot constitutionally stop automobiles systematically or randomly on the chance of discovering something illegal. *United States* v. *Mal-*

lides, 9 Cir., 1973, 473 F.2d 859, 860. Although the inspection warrant and its supporting affidavits contain conclusory allegations of probable cause to believe that the immigration laws are being violated at the San Clemente checkpoint, that is not sufficient. These are not "specific and articulable facts" which would justify the stopping of the defendants' cars in these cases. In practical effect the warrant purports to authorize precisely the unconstitutional conduct we condemned in *Bowen*, *Juarez-Rodriguez*, and *Brignoni-Ponce*.

Search warrants provide no substitute for probable cause. The Fourth Amendment states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." Thus, although the standard of probable cause may in some cases be a flexible one as discussed below in connection with administrative inspections, the root concept of a search warrant is that it will provide a second level of protection, the interposition of the mediating judgment of a neutral and detached magistrate, to bolster the basic protection of requiring probable cause to justify an intrusion on Fourth Amendment interests.[9] *See United States* v. *United States District Court*, 1972, 407 U.S. 297, 316.

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[9] We recognize, of course, that there are well established exceptions to the warrant requirement, for example, where exigent circumstances make obtaining a warrant infeasible. *E.g.*, *Chambers* v. *Maroney*, 1970, 399 U.S. 42; *Carroll* v. *United States*, 1925, 267 U.S. 132.

The warrant before us fails to provide either level of protection. As already noted, the warrant is not based on any probable cause or even founded suspicion focussed on any particular individual or vehicle. Nor does the warrant interpose the mediating judgment of a magistrate because the warrant is a blanket authorization for border patrol agents to stop all cars and to detain for interrogation certain cars at *their* discretion. They, not the magistrate, make the decision. As the Supreme Court noted in *Aguilar* v. *Texas*, 1964, 378 U.S. 108, 111:

> Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate perform his "neutral and detached" function and not serve merely as a rubber stamp for the police.

Here the magistrate has not performed his "neutral and detached" function. He could not possibly be more than a rubber stamp. Because the warrant delegates too much discretion to border patrol agents who may, under the warrant, detain anyone driving north on the highway, the intrusion is not buffered by the specific mediating judgment of a magistrate. Nor is the warrant saved by its authorization to stop all traffic. Absent founded suspicion, that too is unreasonable. In short, we can find no justification in established Fourth Amendment principles for the area warrant checkpoint system.

III. *The administrative inspection doctrine does not justify checkpoint stops under an area warrant.*

Even though the checkpoint stops do not satisfy the traditional criteria of constitutionally reasonable seizures and searches, the government argues that the administrative inspection doctrine should be extended to permit checkpoint operations under generalized area warrants like the one now before us.[10] We recognize that the seeds of this argument were sown by Mr. Justice Powell in his concurrence in *Almeida-Sanchez*, but we nevertheless reject the proposed analogy to the administrative inspection cases.

A. *The administrative inspection analogy is inapposite.*

In *Almeida* the government attempted to justify its roving patrol searches under the administrative inspection doctrine. However, the Court, including Justice Powell, found *Colonnade Catering Corp.* v. *United States*, 1970, 397 U.S. 72, and *United States* v. *Biswell*, 1972, 406 U.S. 311, inapposite because they approved warrantless administrative inspections of commercial enterprises engaged in businesses, the sale of liquor and guns respectively, which were closely regulated by the government. Similarly the Court, including Justice Powell, found *Camara* v. *Municipal Court*, 1967, 387 U.S. 523, and *See* v. *City of Seattle*,

[10] In *Bowen* we declined to express an opinion on the validity of such then hypothetical area warrants. 500 F.2d at 967. They are no longer hypothetical.

1967, 387 U.S. 541, of no avail because in those cases the Court said that it would uphold administrative inspections to enforce community health and welfare regulations where made under a warrant supported by particular physical and demographic characteristics of the area to be searched.

However, Justice Powell saw in the latter two cases an analogy to the problem of enforcing the immigration laws *in a border area* (emphasis ours—413 U.S. at 281) that led him to postulate the existence of a "functional equivalent of probable cause" that might justify a roving patrol search.[11] The government argued in *Almeida* that roving patrol checks of automobiles were the only feasible means of apprehending "illegal" aliens who crossed the border surreptitionsly.[12] Recognizing the seriousness and ligitimacy of the law enforcement problem and the necessity of safeguarding Fourth Amendment interests, Justice Powell proposed a resolution to balance these two contending forces.

By analogy to *Camara*, Justice Powell hypothesized a functional equivalent of probable cause for roving

[11] It bears emphasis that neither the majority opinion in *Almeida* nor Justice Powell's concurrence dealt with fixed checkpoints. Both addressed only roving patrol searches near the border. It does not necessarily follow that Justice Powell would approve of area warrants for checkpoints distant from the border.

[12] *Almeida, supra*, 413 U.S. at 276 (Powell, J., concurring). We cannot ignore the irony in the government's present argument that the *only* effective way to apprehend aliens who have surreptitously entered is to conduct fixed traffic checkpoints.

searches based on (1) a long history of judicial and public acceptance of the type of search; (2) the need to conduct such a search given the absence of alternatives for vindicating the public interest; and (3) the limited invasion of privacy occasioned by inspections which are "neither personal in nature nor aimed at the discovery of evidence of crime." 413 U.S. at 278. *Camara, supra,* 387 U.S. at 537. Justice Powell found the first two criteria satisfied in the roving patrol context.[13] However, because roving patrol searches and checkpoint operations for that matter, are both personal and crime-investigative, Justice Powell abstracted the broader criterion of a limited invasion of privacy. Finding support in the facts that roving patrols, though not border searches per se, were "incidental to the protection of the border" and that they involved searches of automobiles rather than persons or buildings, Justice Powell concluded that roving patrols can be considered a modest intrusion on Fourth Amendment

[13] Whether roving patrols, or checkpoints, have enjoyed a history of acceptance comparable in length to that of the building inspections involved in *Camara* is open to debate. For an argument that they have not, see Note, *Area Search Warrants in Border Zones: Almeida-Sanchez and Camara,* 84 Yale L. J. 355, 361-62 (1974). We do not pause to enter that debate because we find the other two criteria unsatisfied. For other recent law review commentary on area warrants in border cases, see Leahy, *Border Patrol Checkpoint Operation under Warrant of Inspection: The Wake of Almeida-Sanchez* v. *United States,* 5 Calif. West. Int'l L. J. 62 (1974); Note, *The Aftermath of Almeida-Sanchez* v. *United States: Automobile Searches for Aliens Take on a New Look,* 10 Calif. West. L. Rev. 657 (1974).

interests. 413 U.S. at 279. He thus concluded that there exists a constitutionally adequate equivalent of probable cause for roving vehicular searches in border areas.

Given an adequate equivalent of probable cause, Justice Powell would validate roving patrol searches *if* they are judicially authorized in advance by an appropriately drawn "area warrant." Conceding that the standards defining cause for issuance of such unprecedented area warrants are relatively unstructured, Justice Powell proposed four relevant factors:

> (i) the frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area; (ii) the proximity of the area in question to the border; (iii) the extensiveness and geographic characteristics of the area, including the roads therein and the extent of their use [footnote omitted] and (iv) the probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area.

413 U.S. at 283-84.

Were we to accept Justice Powell's premise that an appropriately drawn area warrant would justify a roving patrol, and the government's corollary that an appropriately drawn area warrant would justify a fixed checkpoint, we would still conclude on the facts of the cases now before us that Justice Powell's

proposed standards are not satisfied here.[14] However, we conclude that Justice Powell's premise and the government's corollary themselves are unsatisfactory.

We cannot accept the notion that an area warrant can constitutionally authorize immigration checkpoint operations in the interior of the United States because we think that the analogy to the administrative inspection cases is inapt and because we think that the concept of an area warrant, under these circumstances, is contrary to certain fundamental precepts of the Fourth Amendment, as revealed by its antecedent history.

What troubles us most about the administrative inspection analogy, proposed by Justice Powell for roving patrols in border areas and now urged by the government for fixed checkpoints, is the government's suggestion that somehow the asserted need to conduct such immigration seizures and searches establishes adequate cause to disrupt the normal flow of traffic on a major highway. The notion that law enforcement needs alone justify such intrustions was put to rest by the majority in *Almeida*:

> It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is

[14] See discussion below in part III, B of this opinion.

> precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.

413 U.S. at 273. Under *Camara*, to be sure, the absence of workable alternatives, coupled with a comparatively unobstrusive regulatory inspection, may render such an inspection constitutionally reasonable if conducted under a suitable area warrant. However, *Camara* was a different case from the ones now before us in just two crucial respects.

First, there was no doubt in *Camara* that the only way to discover certain dilapidations that violated the housing codes, such as faulty internal wiring, was to conduct routine periodic building inspections. 387 U.S. at 535-37. In contrast, the influx of illegal aliens could conceivably be stemmed in various ways. It is not our business to tell the executive how to enforce the laws, nor to tell the Congress what laws to enact. But when, as in this case, the government chooses to pitch its case upon an alleged unavoidable necessity if the laws are to be successfully enforced, we feel compelled to comment on the claimed necessity.

Efforts at the border to repeal aliens who attempt entry by stealth and subterfuge can, given additional manpower, be intensified. We note that given the present border patrol manpower, there are simply too few fingers to plug the many leaks in the dike, and we do not underestimate the cost of intensifying the "line watch" patrols on the physical border. Nonetheless, the mere fact that protecting a con-

stitutional right will impose a heavy burden on the federal fisc is not a proper ground for our failing to protect that right. Checkpoint operations "must meet constitutional standards regardless of their utility in carrying forward the difficult mission of the Border Patrol." *Bowen, supra*, 500 F.2d at 963.

Nor are the government's alternatives exhausted with intensifying the line watch. The major forces that bring aliens to this country from Mexico are economic. Here they can get jobs, and jobs at higher wages than they can earn at home. At the same time, and because they are in this country illegally, they cannot complain about the working conditions or wages on the jobs that they obtain in this country. This produces an almost irresistible economic incentive to American employers to employ them. They are cheap and docile labor. We know that in many cases the terms and conditions under which they are employed are deplorable. In this respect they compete and compete unfairly, with American labor. Congress could, if it would, neutralize these forces by imposing sanctions on employers who hire "illegal" aliens.[15]

There are other actions that might be taken. The I-151, or "green card" program and the I-186 temporary border pass card program could be eliminated.

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[15] We take judicial notice of just such a legislative proposal made in the "Rodino Bill," H.R. 982, 93d Cong., 1st Sess. (1973), which passed the House of Representatives on May 3, 1973. 119 Cong. Rec. No. 67 at H 3332 (May 3, 1973). The Senate has never acted on it. *See* 2 CCH Cong. Index, 93d Cong., 5054 (1973-74).

Congress could require that every alien entering from Mexico have a valid passport and entry visa. This might interrupt or reduce the extensive shopping that card holders now do in American border cities, but it is an alternative open to the Congress if it finds the "illegal" alien problem as serious as government counsel tells us that it is.

So, too, the Congress could abolish the alien "commuter" system, which is an obvious subterfuge, that was before the Court in *Saxbe* v. *Bustos*, 1974, —— U.S. —— (Dec. 25, 1974). See Note, *Bustos* v. *Mitchell (Saxbe* v. *Bustos): The Dilemma of Commuting Alien Laborers*, 5 Calif. West. Int'l L. J. 184 (1974). We do not purport to have explored other possibilities. We mention the foregoing only because the government is here claiming "necessity" as a reason for abandoning constitutional protections. We are not persuaded by the government's argument that operation of the San Clemente checkpoint, and others like it, is the only way to deter the entry of "illegal" aliens from Mexico. This is not to say, we repeat for emphasis, that even if it were the only way, it would be constitutionally permissible.

Moreover, the inspection authorized in *Camara* were not in the nature of a criminal investigation. There the Court distingiushed the administrative inspection for housing code violations, for which an area warrant could issue on less than probable cause to believe that a particular dwelling violated the minimum standards, from a search in a criminal investigation.

In cases in which the Fourth Amendment requires that a warrant to search be obtained, "probable cause" is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. To apply this standard, it is obviously necessary first to focus upon the governmental interest which allegedly justified official intrusion upon the constitutionally protected interests of the private citizen. For example, in a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant, is "reasonable" only when there is "probable cause" to believe that they will be uncovered in a particular dwelling.

Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary government interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety. . . .

. . . .

. . . [B]ecause the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy, 387 U.S. at 534-35, 537.

That the border patrol checkpoint operations are both personal in nature and aimed at the discovery

of evidence of a crime is beyond dispute. Inherent in the government's argument here, and in its argument in *Almeida* (413 U.S. at 278 (Powell, J., concurring)) is the fallacy that its practice of simply deporting aliens rather than prosecuting them gives its operations a quasi-administrative aspect. Although most aliens are simply deported, it is nonetheless true that the government does seek to prosecute virtually all *smugglers* of illegal aliens. *Baca*, R.T. 462-65. *See Baca, supra*, 368 F. Supp. at 406 ("particular attention" paid to smuggling operations). Furthermore, border patrol agents are armed with service revolvers. *Baca* R.T. 255, 289. They are law enforcement officers and cannot rationally be viewed as administrative personnel. *Id.* at 256. The very facts of the three appeals now before us attest to their criminal law enforcement duties and activities. The checkpoints perform primarily crime-investigative rather than administrative functions.

Precisely because the checkpoint operations are part of a crime investigation scheme rather than a regulatory scheme, we think what Mr. Justice Clark said in his dissent to *Camara* and *See* with respect to the administrative inspection warrants there approved applies to the San Clemente checkpoint warrant of inspection. It sets up "a newfangled 'warrant' system that is entirely foreign to Fourth Amendment standards." 387 U.S. at 547.

The San Clemente warrant of inspection in an area of general warrant with many of the objectionable features of the "infamous" writs of assist-

ance which are anathema to the colonists of Massachusetts in 1761.[16] The writs of assistance were warrants empowering British customs officials and their deputies to search at will in the port of Boston wherever they suspected that they might find imported goods on which no customs duty had been paid, and to break open receptacles or packages suspected of containing such smuggled goods. N. Lasson, History and Development of the Fourth Amendment to the United States Constitution 54 (1937). *See generally* Horace Gray, *Writs of Assistance* contained in Appendix I to Quincy's Massachusetts Reports 1761-1772.

The primary vices of the writs of assistance, and their precursors, the general writs originating with the Court of Star Chamber, were (1) that the warrants could be issued without sufficient cause; (2) that persons and places were not particularly specified; and (3) that the warrants left too much to the discretion of the bearer. Lasson, *supra*, at 26. Even before the writs of assistance controversy, Sir. Matthew Hale, Lord Chief Justice of the Court of King's Bench from 1671 to 1676, had denounced both blank warrants to apprehend all persons suspected of having committed a given crime and general warrants to search any suspected place for stolen goods.

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[16] The controversy over those writs was "the first in the chain of events which led directly and irresistibly to revolution and independence." N. Lasson, History and Development of the Fourth Amendment to the United States Constitution 51 (1937). *See also Frank* v. *Maryland*, 1959, 359 U.S. 360, 364.

Presaging modern constitutional principles, Hale insisted that valid warrants must specify with particularity the person to be seized or the place to be searched and must establish probable cause therefore to the satisfaction of a magistrate. Sir Matthew Hale, History of the Please of the Crown, vol. I at 576-77, 580, vol. II at 110, 112-14, 149-51 (1736). *See also* Lasson, *supra*, at 35-36.

Articulating his objections to the general warrants in his treatise, Hale wrote:

> [T]hese warrants are judicial acts, and must be granted upon examination of the fact. And therefore, I take those general warrants dormant, which are made many times before any felony committed, are not justifiable, for it makes the party to be in effect the judge; and therefore searches made by pretense of such general warrants give no more power to the officer or party, than what they may do by law without them. II Hale, *supra*, at 150.

In retrospect, the United States Supreme Court has noted that the writs of assistance issued in Massachusetts in 1761 were considered " 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.' " *Boyd* v. *United States*, 1886, 116 U.S. 616, 625.[17]

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[17] While writs of assistance stirred controversy in colonial America, general warrants were also the subject of judicial

The unmistakably parallel vice of the inspection warrant for the San Clemente checkpoint is that, without having issued on probable cause—or even founded suspicion—focused on any particular person or vehicle, the warrant purports to authorize agents to do that which they clearly could not do without the warrant: namely, to stop vehicles without cause or founded suspicion. The warrant purports to delegate to the border patrol agent on the "point" the unfettered discretion to stop any or all cars and to divert them for detention and questioning at secondary. This, we conclude, such a warrant cannot constitutionally do. *Cf. Bowen, supra,* 500 F.2d at 963-64. The antecedent history of the Fourth Amendment teaches us the dangers of giving judicial sanction to a general area warrant, particularly when it is used for criminal investigative purposes. Like the writs of assistance used to enforce the British colonial customs system, the present day border patrol checkpoints and area warrant partake too much of "burning a barn to roast an egg." Lasson, *supra,* at 68 n. 60.

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condemnation in England in the "General Warrant Cases." *Leach* v. *Money,* 1765, 19 St. Tr. 1002 (general warrant to arrest unnamed persons against whom a charge had not yet been formulated held illegal); *Wilkes* v. *Wood,* 1763, 19 St. Tr. 1153 (papers of an unnamed person could not be seized on a general warrant); *Entick* v. *Carrington,* 1765, 19 St. Tr. 1030 (general warrant for seizure of papers of named persons held illegal). *See generally* Wade and Phillips' Constitutional Law 366-67 (5th ed. 1955).

B. *This inspection warrant would be invalid even under the administrative inspection analogy.*

Even if we agreed with the government that the proper accommodation of law enforcement needs and Fourth Amendment protections would be to permit immigration checkpoints under judicially approved area warrants, we would conclude that the San Clemente checkpoint does not meet the standards sketched by Justice Powell in his concurrence in *Almeida.*

First, the frequency with which illegal aliens pass through the San Clemente checkpoint is far too low to make operation of a checkpoint reasonable. During the effective period of the warrant of inspection, only 0.12 percent of the passing cars were found to contain "illegal" aliens. Other considerations aside, that miniscule fraction alone would render the checkpoint operation unreasonable.

Second, the San Clemente checkpoint is 66 miles from the border. Surely, Justice Powell envisioned roving patrols much nearer the border. In any event, we think 66 miles is too far away, particularly where the checkpoint is located on an interstate highway which is the major traffic artery between the two largest cities in California, an artery that carries many million cars each year.

Third, although we are not sure how to weigh the "extensiveness and geographic characteristics of the area" because the San Clemente inspection warrant is narrowly limited to a fixed point along the highway, we note that Justice Powell's explanation of

this factor used examples which reinforce our conclusion that he contemplated searches very near the border:

> Depending upon the characteristics, there may be probable cause for the search to be authorized only for a designated portion of a particular road or such cause may exist for a designated area which may contain one or more roads or tracks. *Particularly along much of the Mexican border*, there are vast areas of uninhabited desert and arid land which are traversed by few, if any, main roads or highways, but which nevertheless may afford opportunities—by virtue of their isolated character—for the smuggling of aliens. 413 U.S. at 284 n. 4 (emphasis added).

Accordingly, we conclude that geographic characteristics are relevant only to establish an essential nexus with the border. Here there was none.

Fourth, the probable, indeed actual, degree of interference with the rights of innocent persons at the checkpoint is intolerable. Roughly 999 of every 1000 cars passing the checkpoint carry only persons who are lawfully within the country and under *Carroll*, *supra*, are "entitled to use the public highways [and] have a right to free passage without interruption." Although the duration of a stop and even a detention for immigration questioning may be brief, the concentration of illegal alien traffic in relation to the general traffic on the highway is too small. We cannot countenance the cumulative intrusion of stopping ten million cars per year where only one out of every

1000 passing cars may contain aliens illegally within the country.

In short, if Justice Powell's *Almeida* concurrence were our guide, we would conclude that the United States magistrate who issued the instant warrant of inspection for San Clemente erred in resolving what Justice Powell calls a "delicate question of constitutional judgment." 413 U.S. at 284.

IV. *Conclusion.*

Because we hold the checkpoint operations under the warrant of inspection constitutionally unreasonable,[18] the evidence obtained as a result of the traffic check in each case should have been suppressed. *Wong Sun* v. *United States*, 1963, 371 U.S. 471; *United States* v. *Juarez-Rodriguez*, 9 Cir., 1974, 498 F.2d 7. Accordingly we reverse the conviction in No. 74-2462 and affirm the orders of suppression in Nos. 74-2680 and 74-2714.

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[18] Because we hold the inspection warrant procedure itself constitutionally infirm and therefore beyond the authority of any judicial officer, we need not consider the additional argument that a United States magistrate (as opposed to a judge) is not empowered to issue such warrants. We add, however, that we perceive no distinction here between the powers of judges and those of magistrates. By statute, 28 U.S.C. § 636(a)(1), magistrates have all powers conferred upon Commissioners by the Federal Rules of Criminal Procedure, which include the authority to issue both arrest and search warrants under Rules 4 and 41. The term "magistrate" used in those rules includes both federal magistrates and federal judges. Rule 54(c). We see nothing in the rules that might allow a judge but not a magistrate to issue an inspection warrant.

JAMES M. CARTER, Circuit Judge, dissenting:

Judge Duniway correctly states the limited issues presented by the above appeals, viz.—(1) the legality of the stop and diversion of the vehicles to the secondary inspection area, and (2) the legality of the interrogation of the occupants. In *Guillen*, the two defendants were riding in the front seat. Four aliens were found by a search of the trunk. Interrogation of these four aliens showed their illegal status and that one of the defendants, Medrano-Barragan, was also an illegal alien. Our record does not disclose whether the search of the trunk was based on consent or on probable cause because of the presence of an illegal alien in the front seat or on Section 3 of the warrant: "to conduct routine inspection of the vehicles for the presence of aliens."

In *Martinez-Fuerte* and *Jiminez-Garcia*, there was only the stop, diversion and interrogation.

Judge Duniway, as shown by notes 1 and 3, does not reach the question of the search in *Guillen*. I would, as discussed *infra*, uphold the stop, diversion and interrogation in all three cases but remand *Guillen* for findings as to the basis of the search, i.e., whether consent, probable cause or the terms of the warrant, and whether the testimony of the aliens found in the trunk was admissible.

The most interesting aspect of the majority opinion is its references to Justice Powell's concurrence in *Almeida-Sanchez*. The opinion reads as if Justice Powell stood alone in his views as to the validity of an area warrant. Whether or not Justice Powell was

correct in his views is one question, but a breakdown of the votes in *Almeida-Sanchez* indicates that his views were supported by a majority of the Court. We concede that Justice Powell's concurrence did not involve fixed checkpoints.

In his dissent in *Almeida-Sanchez*, Justice White (joined by the Chief Justice, Justice Blackmun and Justice Rehnquist) stated:

> ". . . Justice Powell would uphold *searches by roving patrol* if authorized by an area warrant on less than probable cause in the traditional sense. I agree with Mr. Justice Powell that such a warrant so issued would satisfy the Fourth Amendment . . ." 413 U.S. at 288. (Emphasis added).

Thus five Justices are on record in support of the validity of area search warrants executed by roving patrols.

Justice Stewart stated: "The Justices who join this opinion [Douglas, Brennan, Marshall and Powell] are divided upon the question of the constitutionality of area search warrants such as described in Mr. Justice Powell's concurring opinion." *Id.* at 270 n. 3. I speculate that had only Justice Powell been of the view expressed, the footnote would have been unnecessary.

I conclude that Justice Powell's concurrence in *Almeida-Sanchez*, when read together with Chief Justice Burger's dissent, supports the legality of the stop, limited visual inspection, and occasional interrogation of motorists at a fixed checkpoint, pursuant to

a warrant issued by a "neutral and detached magistrate" involved in these cases.

The four dissenters in *Almeida-Sanchez* would have upheld a warrantless search by *roving* patrols on less than probable cause. Clearly, they would uphold a *fixed checkpoint* procedure pursuant to a "checkpoint" warrant. If Justice Powell would uphold the present warrant, the necessary majority would be created. Without repeating it here, I rely generally on the analysis of the issue by Justice Powell for my dissent. I comment briefly.

Justice Powell recognized the need for traffic checking operations removed from the physical boundary line, and that stops and searches on less than probable cause could be constitutionally conducted:

> "The conjunction of these factors—consistent judicial approval, absence of a reasonable alternative for the solution of a serious problem, and only a modest intrusion on those whose automobiles are searched—persuades me that under appropriate limiting circumstances there may exist a constitutionally adequate equivalent of probable cause to conduct *roving vehicular searches* in the border areas." *Id.* at 279 (emphasis added).

The four factors suggested by Justice Powell as relevant to determining the validity of warrants such as the one involved in the present cases are noted at p. 16 of the majority's opinion.

Although 68 miles from the border would seem to be too far to qualify under Justice Powell's second factor, a number of considerations demonstrate that

the San Clemente checkpoint is in fact reasonable. First, in requiring proximity to the border, Justice Powell was referring to *roving patrols* in a rural, unlighted area. If people could be stopped at any time by roving patrol cars, without any notice, then clearly the *area* in which such stops could occur should be limited to an area quite close to the border, where very few residences or travelers could be found. The same purpose is achieved, however, by a fixed checkpoint which limits the area of possible search to a small, permanent portion of a single road. The checkpoint is lighted. There is abundant notice, most cars need only slow down, there are no houses, etc. In other words the fixed San Clemente checkpoint is *less* intrusive than roving patrols in a relatively unpopulated area close to the border.

Secondly, Justice Powell referred to "roving vehicular *searches.*" (Emphasis supplied). No search is involved in two of our cases—only a stop and interrogation. In all three cases the interrogation revealed the alien status of either the driver or the passengers, or both. The majority in our case limits its holding to stops, diversion and interrogation. *See* notes 1 and 3.

Nor is the inconvenience or invasion of privacy (Justice Powell's fourth relevant factor) unreasonable. With respect to the vast majority of motorists passing through the various checkpoints maintained by the Government, a visual inspection is performed without the necessity of more than a temporary slowdown of traffic. *Baca, supra*, 368 F.Supp. at 406-407.

The majority states that it "cannot countenance the cumulative intrusion of stopping ten million cars per year where only one out of every 1,000 passing cars may contain aliens illegally within the country." I cannot accept this description of the procedures at the San Clemente checkpoint. As indicated *supra*, most cars are never even stopped. Rather, "[i]f the agent does not have reason to believe that the vehicle approaching the checkpoint is carrying aliens, he may exchange salutations, or merely wave the vehicle through the checkpoint." *Baca*, *supra*, at 406-407. From the record in *Baca*, on the basis of which the present warrant was issued, it would be more reasonable to conclude that only the 820 cars directed to secondary were stopped during the nine-day warrant period instead of the 145,960 suggested by the majority.

The majority, in footnote 7, cites the case of *United States* v. *Evans*, —— F.2d —— (9 Cir., 10/23/74) and states: "We recently held that the mere diversion of a moving automobile through a zone (a traffic checkpoint) where border patrol officers could see in plain view two aliens lying on the floor behind the front seat does not violate any constitutionally protected expectation of the right of privacy."

Surely, if a diversion of a car through a checkpoint was not illegal, the *slowing* of cars at a checkpoint would also not be illegal.[1]

[1] At least two circuits have upheld *stops* at fixed checkpoints for the purpose of making routine inquiries as to the nationality of the occupants—even without a warrant. United States v. Hart, —— F.2d ——, 16 Cr.L. 2382 (5 Cir. Jan. 15, 1975) ("A permanent checkpoint does not have the constitutionally frightening aspect of a roving patrol"); United States v. Bowman, 487 F.2d 1229 (10 Cir. 1973).

The majority makes much of the inconvenience to travelers who passed through checkpoints but were not diverted for interrogation or inspection. The slowing of the 145,410 cars during the nine-day period of the warrant in question was not unreasonable under constitutional provisions.

With respect to Justice Powell's first relevant factor, the court below found, and the Government makes a strong factual showing, that illegal aliens are frequently transported to Los Angeles and farther north via Interstate 5. *Amicus Curiae* calculated that 319,000 illegal aliens pass through the checkpoint each year. Even though very few actual stops were made by the agents (only 820 of 145,960 vehicles during the nine days of the warrant), during 1973, 16,863 deportable aliens were apprehended at the checkpoint and the number *deterred* is inestimable.

I question the majority's statistics and percentages on this point. The opinion states at p. 8 that "border patrol statistics reveal that of the 145,960 vehicles passing through the checkpoint, only 171, or 0.12 percent, were found to contain deportable aliens." Since all but 820 of the vehicles passed through without a "stop" or inquiry, however, aliens were found to be present in about 21 percent of the vehicles stopped (171 out of 820). Further, in only 202 of

the 820 vehicles referred to "secondary" for questioning was there any interrogation or inspection. Of those 202 vehicles, 171 contained illegal aliens—in 169 (84 percent) the aliens were in plain view.

Thus, as the degree of intrusion and inconvenience increases, so also does the likelihood of discovering illegal aliens *in plain view*. And this represents merely the "tip of the iceberg." In *Baca, supra*, the court found that:

> "[w]hile a large number of apprehensions are made at the checkpoints each year, as related above, the primary reason for their operation is that they effectively deter large numbers of aliens from illegally entering the country or violating the terms of any temporary crossing card they may have, because they form an effective obstacle and are located on all major routes north out of the border region." 368 F.2d at 407.

In his *Almeida-Sanchez* concurrence, Justice Powell stated: "In short, the determination of whether a warrant should be issued for an area search involves a balancing of the legitimate interests of law enforcement with protected Fourth Amendment rights." 413 U.S. at 284. The warrant in these cases was very limited—a ten-day duration, single designated place on a highway, small percentage of vehicles stopped, and smaller yet investigated. The warrant was issued following careful scrutinization of the factual basis by a neutral and detached magistrate. These facts demonstrate the reasonableness of the warrant.

The Fourth Amendment and *Almeida-Sanchez* require no more.

In *Martinez-Fuerte*, I would affirm the conviction. In *Jiminez-Garcia*, I would reverse the order granting the motion to suppress and remand for trial. In *Guillen*, I would uphold the stop and diversion, but remand for findings concerning the subsequent search.[2]

I would at least remand to the district court for consideration of this issue, regardless of the validity of the warrant in question.

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[2] Aside from the principal issues in these cases, I think that United States v. Guana-Sanchez, 484 F.2d 590 (7 Cir. 1973), *cert. granted*, June 17, 1974, 42 U.S.L.W. 3685 may have an impact on our case, Judge Pell's strong dissent raised the question whether it is reasonable under the exclusionary rule of the Fourth Amendment to exclude the testimony of witnesses to a crime; and whether a defendant, in a case similar to ours, has standing to raise the exclusionary issue as to the testimony of passengers in the car he was driving.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-2462
No. 74-2680
No. 74-2714
D.C. #74-1350

UNITED STATES OF AMERICA, PLAINTIFF/APPELLEE

v.

AMADO MARTINEZ-FUERTE, DEFENDANT/APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF/APPELLANT

v.

JOSE JIMINEZ-GARCIA, DEFENDANT/APPELLEE

UNITED STATES OF AMERICA, PLAINTIFF/APPELLANT

v.

RAYMOND RANGEL GUILLEN, FERNANDO MEDRANO-BARRAGAN, DEFENDANTS/APPELLEES

JUDGMENT

APPEAL from the United States District Court for the Southern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Clause be, and hereby is REVERSED in 74-2462 and AFFIRMED in 74-2680 and 74-2714.

Filed and entered March 5, 1975

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Apr. 17, 1975, Emil S. Melfi, Jr., Clerk, U. S. Court of Appeals]

No. 74-2462

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

AMADO MARTINEZ-FUERTE, DEFENDANT-APPELLANT

No. 74-2680

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

JOSE JIMINEZ-GARCIA, DEFENDANT-APPELLEE

No. 74-2714

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

RAYMOND RANGEL GUILLEN, FERNANDO MEDRANO-BARRAGAN, DEFENDANTS-APPELLEES

Before: DUNIWAY and CARTER, Circuit Judges, and WEIGEL,* District Judge

The panel as constituted in the above cases having voted to deny the petition for rehearing, the full

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* The Honorable Stanley A. Weigel, United States District Judge for the Northern District of California, sitting by designation.

court was advised of the suggestion for rehearing in banc and of the panel's vote. At the request of a member of the court, the request for in banc consideration was submitted to the active members of the court, but it failed to receive a majority of the votes.

Therefore, the petition for rehearing is denied, and the suggestion for rehearing in banc is rejected. The mandate is stayed pending decision by the Supreme Court in *United States* v. *Bowen*, 9 Cir., 1974, in banc, 500 F.2d 960, *cert. granted*, Oct. 15, 1974 (No. 73-6848) and in a companion case, *United States* v. *Ortiz*, 9 Cir., 1974 (Mem. No. 74-1249), *cert. granted*, Oct. 15, 1974 (No. 73-2050).

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

I have examined the attached application for a warrant of inspection to operate the San Clemente checkpoint and after due consideration of the results of the previous warrants commencing June 22, 1974, which resulted in the apprehension of 8,591 deportable aliens, I would conclude that there exists probable cause to operate the checkpoint at this time. However, being governed by the authority of the Ninth Circuit Court of Appeals as expressed in the decision *United States* v. *Martinez-Fuerte, et al.*, —— F.2d —— (9th Cir. March 5, 1975), Case No. 74-2462, I must reject the government's application at this time.

/s/ Howard B. Turrentine
HOWARD B. TURRENTINE
United States District Judge

March 18, 1975

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN THE MATTER OF AN APPLICATION BY THE UNITED STATES OF AMERICA FOR AN INSPECTION WARRANT FOR THE IMMIGRATION AND NATURALIZATION SERVICE TO OPERATE A FIXED TRAFFIC CHECKPOINT ON INTERSTATE ROUTE 5, FIVE MILES SOUTH OF SAN CLEMENTE, CALIFORNIA

I have examined the attached Application for a Warrant of Inspection to operate at the San Clemente checkpoint and have noted the results of the previous warrants commencing June 22, 1974, and the resulting apprehension of 8,591 deportable aliens. I conclude there exists probable cause to operate the checkpoint at this time and to issue a warrant of inspection as attached.

However, I am a senior judge and only one of the three-judge panel which decided *United States* v. *Martinez-Fuerte*, —— F.2d —— (9 Cir. March 5, 1975), Case No. 74-2462, in which I dissented.

Accordingly, I today talked with Judge Duniway, the presiding judge on the panel, and informed him that the Solicitor's Office had authorized the United States Attorney to apply for the warrant shown on the attached application. I also informed him, in summary, of the results of the operation of the checkpoint warrants at San Clemente and elsewhere since June 22, 1974; that 12,007 vehicles had been stopped and aliens had been found in 2,998 cars, and that

a total of 8,591 deportable aliens had been found in the vehicles. I told Judge Duniway that I did not feel that I should authorize the warrant and would not do so unless he approved. He refused to approve of the warrant and informed me that I was authorized to state in writing his refusal.

Accordingly, I decline to execute the attached warrant.

/s/ James M. Carter
JAMES M. CARTER
Senior United States Circuit Judge

March 21, 1975

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN THE MATTER OF AN APPLICATION BY THE UNITED STATES OF AMERICA FOR AN INSPECTION WARRANT FOR THE IMMIGRATION AND NATURALIZATION SERVICE TO OPERATE A FIXED TRAFFIC CHECKPOINT ON INTERSTATE ROUTE 5, FIVE MILES SOUTH OF SAN CLEMENTE, CALIFORNIA

APPLICATION FOR INSPECTION WARRANT

COMES NOW the United States of America in application for a warrant of inspection for the operation of the fixed checkpoint at San Clemente, California, operated by the U. S. Border Patrol. This application is based on the attached affidavits and the findings of fact as reported in *United States* v. *Baca*, 368 F.Supp. 398 (S.D. Cal. 1973).

RICHARD E. BATCHELOR

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN THE MATTER OF AN APPLICATION BY THE UNITED STATES OF AMERICA FOR AN INSPECTION WARRANT FOR THE IMMIGRATION AND NATURALIZATION SERVICE TO OPERATE A FIXED TRAFFIC CHECKPOINT ON INTERSTATE ROUTE 5, FIVE MILES SOUTH OF SAN CLEMENTE, CALIFORNIA

WARRANT OF INSPECTION

TO: Any authorized officer of the Immigration and Naturalization Service, including any agent of the U. S. Border Patrol:

Application having been made by the United States for a Warrant of Inspection for the operation of a fixed checkpoint at San Clemente, California, and having reviewed and considered the findings made by the United States District Court in *United States* v. *Baca*, 368 F.Supp. 398 (S.D.Cal. 1973), and having reviewed the warrant issued on March 6, 1975, including the return thereon and the application therefor,

I am satisfied that there is probable cause to believe that mass violations of the Immigration laws of the United States (Title 8, United States Code, and including, but not limited to 8 C.F.R. § 212.6) have been and are being committed at a point known as the Border Patrol checkpoint on the northbound lanes of Interstate Highway Route 5, approximately five miles south of San Clemente, California.

Wherefore, YOU ARE HEREBY AUTHORIZED:

(1) to conduct an immigration traffic checkpoint on the northbound lanes of Interstate Route 5, five miles south of San Clemente, California, and;

(2) to stop any northbound motor vehicles for the purpose of making routine inquiries to determine the nationality and/or immigration status of the occupants of said vehicles, and;

(3) since the flow of alien traffic occurs at all hours of the day, and since limited operation of the traffic checkpoint would tend to defeat its purpose, the operation of this checkpoint may be conducted at anytime of the day or night, and;

(4) a copy of the warrant shall be displayed in a conspicuous manner at the checkpoint location and upon request, shall be given to any person detained.

(5) the Immigration and Naturalization Service shall file a written return on this warrant containing the following:

A. The approximate number of vehicles passing through the checkpoint during the hours of operation;

B. The approximate number of vehicles stopped for questioning concerning citizenship status;

C. The number of vehicles inspected;

D. The number of vehicles in which aliens were discovered;

E. A recapitulation of the total number of deportable aliens apprehended; and

F. An inventory of any property seized.

(6) This warrant shall be returned within ten days of this date, as required by law.

Dated this —— day of March, 1975, at ——AM/PM.

United States Circuit Judge

AFFIDAVIT

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

RICHARD E. BATCHELOR, being first duly sworn, deposes and says:

1. I am Deputy Chief Patrol Agent assigned to the Chula Vista sector of the United States Border Patrol.

2. The inspection of traffic at strategically located checkpoints on those highways leading from the border to the interior of the United States is the primary component of the in-depth defensive strategy employed by the Border Patrol to prevent the illegal entry of aliens into the United States.

3. The widespread knowledge of the existence of these checkpoints is in itself a deterrent to those aliens contemplating violation of our border. In the absence of these checkpoints, modern means of transportation will be employed to transport the border violator into the interior where he can quickly meld into the general population. The most intensive investigative effort will then be required to locate this illegal alien so that he could be expelled from this country.

4. Roving stops, based upon founded suspicion, are patently impractical on a four-lane freeway with traffic frequently exceeding 1,500 vehicles an hour. The commitment of sufficient manpower along the

international border to repel the hordes of illegal entrants is completely outside our capabilities.

5. The consensus of Border Patrol officials is that no adjustment can be made within the existing resource limitations that can adequately approach the effectiveness of checkpoints, both as a deterrent for illegal entrants and in the apprehension of illegal entrant aliens and smugglers.

6. Reference to the warrants returned since June 22, 1974, indicate that out of the 12,007 vehicles stopped at the San Clemente traffic checkpoint, a total of 2,998 contained illegal aliens. The total deportable aliens apprehended was 8,591.

7. The total number of aliens apprehended would have been significantly higher had we been granted permission to search vehicles at the San Clemente checkpoint.

8. Also, the results would have been more significant had the Temecula traffic checkpoint on Route 395 not been closed due to the discontinuance of the granting of inspection warrants by the district court in October 1974.

9. Considering the past years of alien traffic in my sector and based upon numerous intelligence investigations conducted by the Immigration and Naturalization Service, it is my belief that the closing of our traffic checkpoints in Arizona and California will

cause irreparable damage to our law enforcement efforts in regard to the apprehension of illegal aliens.

RICHARD E. BATCHELOR

Subscribed to before me and sworn to in my presence on March 21, 1975.

United States District Judge

AFFIDAVIT

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

GENE E. HARRIS, being first duly sworn, deposes and says:

1. I am an Assistant Chief Patrol Agent at the Chula Vista Sector and presently assigned as Agent in Charge at the San Clemente Border Patrol traffic check facility. I have been employed by the U. S. Border Patrol in the southwest for 23 years. I am responsible for the operations engaged in by 39 Agents.

2. From 11:30 AM, Thursday, March 6, 1975, through approximately 11:00 AM, Sunday, March 16, 1975, an estimated 80,085 vehicles passed through the San Clemente traffic checkpoint during the 115 hours of operation during this period. We inspected 332 vehicles and found deportable aliens in 187 vehicles. In 187 of these vehicles, aliens were in plain view to the officers in secondary and 1 contained aliens concealed in the trunk. In 145 other cases, the Agents in secondary inspected portions of the vehicles in which concealed aliens could be secreted. In all 145 cases, we had the permission and consent of the driver. Of these 145 vehicles inspected, no deportable aliens were found to be concealed. Therefore, deportable aliens were found in 187 vehicles referred to secondary with the total number of de-

portable aliens apprehended during the 115 hours of operation amounting to 196. See Exhibit A.

3. In one instance, a vehicle referred to secondary by the officer accelerated from the check, necessitating a high-speed chase to overtake the vehicle. In this instance, the vehicle was overtaken and 6 illegal aliens were found in it.

4. During this same period, an additional 65 illegal aliens were received from other law enforcement agencies. These aliens were apprehended as a result of the checkpoint being in operation and the aliens were attempting to walk around the checkpoint, or upon arrival at the San Clemente City limits or when they were observed exiting vehicles south of the checkpoint by the California Highway Patrol and also by the Military Police observing them walking through the Marine Corps Base to avoid the checkpoint.

5. During the hours of operation, there were 4 alien smuggling cases established. Three (3) were accepted for prosecution.

_____

GENE E. HARRIS

Subscribed to before me and sworn to in my presence on March 21, 1975.

_____

United States Circuit Judge

EXHIBIT A

SAN CLEMENTE CHECKPOINT OPERATIONS

Legend:

A—Approximate number of vehicles passing through checkpoint
B—Number of vehicles stopped for questioning
C—Number of vehicles inspected
D—Number of vehicles in which aliens discovered
E—Number of deportable aliens apprehended
F—Property/contraband seized

Date	A	B	C	D	E	F	Shift & No. Hours Open In ( )	
"1975"								
3/6	3740	13	9	3	3	0	12:30P-3:30P	(3)
"	1350	6	3	0	0	0	4P-5P	(1)
3/7	1450	10	5	3	7	0	12:30A-5A	(4.5)
3/8	685	5	4	3	8	0	12:30A-3A	(2.5)
3/9	6300	20	5	5	4	0	1:30P-4P	(2.5)
"	13400	22	13	3	14	0	4P-8P	(4)
3/10	3250	10	8	5	14	0	12 Midnight-7A	(7)
	CLOSED DUE TO RAIN							
3/11	2200	15	8	3	3	0	4:30P-11:30P	(7)
3/12	3350	8	5	2	3	0	1A-8A	(7)
"	3270	14	5	2	2	0	8A-12:45P	(4.75)
"	3700	30	17	7	26	0	4:15P-12 Midnight	(7.75)
3/13	1400	8	5	5	6	0	1A-8A	(7)
"	4370	30	18	5	6	0	8A-4P	(8)
"	4700	24	13	4	10	0*	4P-10P	(6)
3/14	3940	14	10	3	8	0	11:30A-4P	(4.5)
"	2600	9	5	2	2	0	8P-12 Midnight	(4)
3/15	1650	7	6	4	7	0	12 Midnight-8A	(8)
"	6630	20	8	1	2	0	8A-4P	(8)
"	9000	13	9	6	9	0	4P-12 Midnight	(8)
3/16	1700	38	21	12	28	0	12 Midnight-7:30A	(7.5)
"	1400	16	10	6	34	0	8A-11A	(3)
	80085	332	187	84	196			(115)

* 2 armed robbery suspects (U.S.C.) apprehended

AFFIDAVIT

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

JAMES W. MEYERS, being first duly sworn, deposes and says:

1. I am an Assistant United States Attorney for the Southern District of California.

2. On March 5, 1975, a panel of the Ninth Circuit Court of Appeals, in a 2-1 decision, ruled that the warrant of inspection issued by the Honorable Edward A. Infante, U. S. Magistrate, on June 22, 1974, authorizing agents of the U. S. Border Patrol to operate the immigration traffic checkpoint South of San Clemente, California, was invalid under the Fourth Amendment of the Constitution. See *United States* v. *Martinez-Fuerte*, —— F.2d —— (9th Cir. March 5, 1975), Case No. 74-2462.

3. On March 20, 1975, the government's petition for rehearing *in banc* was received in the Clerk's Office for the Ninth Circuit Court of Appeals and filed.

4. On March 18, 1975, I was present when several agents of the U. S. Border Patrol made an application before the Honorable Howard B. Turrentine, U. S. District Judge, for a renewal of the inspection warrant to continue operations which had ceased on March 16, 1975, when the previous warrant had expired.

5. Judge Turrentine denied the application. However, he issued the following written statement:

> "I have examined the attached application for a warrant of inspection to operate the San Clemente checkpoint and after due consideration of the results of the previous warrants commencing June 22, 1974, which resulted in the apprehension of 8,591 deportable aliens, I would conclude that there exists probable cause to operate the checkpoint at this time. However, being governed by the authority of the Ninth Circuit Court of Appeals as expressed in the decision *United States* v. *Martinez-Fuerte, et al.*, —— F.2d —— (9th Cir. March 5, 1975), Case No. 74-2462, I must reject the government's application at this time."

6. On March 20, 1975, Mr. Mark Evans, an attorney on the staff of the Solicitor General of the United States, conveyed to me Solicitor General Bork's direction to me to make an application for an inspection warrant before a Judge of the Ninth Circuit Court of Appeals.

JAMES W. MEYERS
Assistant U. S. Attorney

Subscribed to before me and sworn to in my presence on March 21, 1975.

United States Circuit Judge

RESULTS OF WARRANTS ISSUED SINCE JUNE 22, 1974

Date of Warrant	Hours of Operation	Est. No. of Vehicles Passing	No. of Vehicles Stopped	No. Veh. Aliens In	No. of Deportable Aliens Apprehended
6-22-74	124.2	145,960	820	171	725
7-1-74	93.3	106,500	237	102	398
7-11-74	50.3	29,750	137	84	308
7-19-74	35.7	15,865	112	48	269
7-29-74	101.3	70,825	302	119	491
8-8-74	33.5	15,455	109	45	141
8-16-74	60.7	33,687	222	86	306
8-26-74	82.7	65,195	253	98	342
9-5-74	125.3	79,558	380	122	441
9-13-74	148.0	108,065	416	131	361
9-23-74	158.5	113,335	468	146	393
10-3-74	127.0	60,926	335	99	311
10-11-74	204.5	185,813	792	188	395
10-21-74	191.5	161,263	649	144	366
10-31-74	167.0	147,604	553	100	239
11-8-74	226.5	208,889	716	128	274
11-19-74	164.5	109,246	441	59	107
11-27-74	130.2	110,981	427	59	125
12-6-74	224.5	168,921	235	88	159
12-17-74	95.0	88,654	279	42	71
12-23-74	143.0	142,096	452	79	157
1-2-75	157.2	137,887	533	124	265
1-10-75	178.3	200,711	752	146	325
1-20-75	173.0	154,865	734	164	348
2-7-75	71.5	59,426	284	58	127
2-14-75	170.3	174,162	566	148	530
2-24-75	129.5	115,120	471	136	421
3-6-75	115.0	80,085	332	84	196
Total		3,090,844	12,007	2,998	8,591

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 577393 170

Supreme Court, U. S.
FILED
SEP 22 1975
MICHAEL RODAK, JR., CLERK

No. 74-1560

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

AMADO MARTINEZ-FUERTE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1560

UNITED STATES OF AMERICA, PETITIONER

v.

AMADO MARTINEZ-FUERTE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

After the petition for a writ of certiorari in this case was filed, the Court decided *United States* v. *Ortiz,* No. 73-2050, and *United States* v. *Brignoni-Ponce,* No. 74-114. In *Ortiz,* the Court held that warrantless searches of private vehicles for aliens at Border Patrol traffic checkpoints removed from the border and its functional equivalents, if conducted without probable cause or consent, violate the Fourth Amendment. In *Brignoni-Ponce,* the Court held that warrantless roving patrol stops of vehicles in the border area to inquire about the citizenship of the occupants are permissible under the Fourth Amendment

only if the officers "are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country" (slip op. 11).

The Court expressly left open in those decisions the questions "whether Border Patrol officers may lawfully stop motorists for questioning at an established checkpoint without reason to believe that a particular vehicle is carrying aliens" (*Ortiz,* slip op. 6, n. 3) and whether a judicial warrant authorizing stops or searches may properly issue "based on information about the area as a whole, in the absence of cause to believe that a particular car is carrying concealed aliens" (*ibid.;* see also *Brignoni-Ponce,* slip op. 8–9, n. 7). Both questions are presented by the petition in this case, and both are of continuing importance to the Border Patrol's enforcement effort.

Checkpoint stops of vehicles for the purpose of brief inquiry concerning the occupants' right to be in the United States are the single most important Border Patrol traffic operation, in terms both of apprehending illegal entrants and of deterring unauthorized entry. Although a brief stop and inquiry cannot accomplish all the enforcement objectives that would be achieved by a limited search for concealed aliens, many illegal entrants are discovered riding in the passenger compartments of vehicles, and an experienced officer's observations at the time of a stop frequently give him probable cause to believe that the

vehicle does contain concealed aliens (see *Ortiz,* slip op. 6–7).[1]

The routine stops involved in the present case were made pursuant to a judicial warrant. As we stated in the petition (p. 11), however, the validity of the warrant need not be reached if, as we contend, the stops were valid regardless of the warrant. With respect to that threshold question, the Fifth Circuit recently held that there is "no constitutional dereliction in stopping vehicles at [a] permanent checkpoint for the purpose of determining the occupant's citizenship." *United States* v. *Santibanez,* No. 74–3382, decided August 11, 1975. That decision, like the Tenth Circuit's decision approving warrantless checkpoint stops (*United States* v. *Bowman,* 487 F. 2d 1229), conflicts with the Ninth Circuit's decision in the present case and in *United States* v. *Esquer-Rivera,* 500 F. 2d 313.

The Border Patrol is currently operating its checkpoints within the jurisdiction of the Fifth and Tenth

[1] The effectiveness of the stop procedure is demonstrated by the results at the San Clemente checkpoint during the nine-month period when it was operated pursuant to warrants authorizing such stops. See Pet. 13, n. 9. Prior to this Court's decisions in *Almeida-Sanchez* and *Brignoni-Ponce*, the Border Patrol traditionally supplemented its checkpoint operations by the use of roving patrols on secondary or bypass roads. While the absence of routine roving patrols makes it easier for illegal entrants to evade the established checkpoints, the nine-month statistics at San Clemente, compiled at a time when roving patrol operations were not being used, indicate the continued effectiveness and importance of checkpoint stops as an immigration law enforcement method.

Circuits by stopping vehicles without warrants for purposes of inquiry. Under the Ninth Circuit's decision in the present case, however, checkpoint stops may not be made even with a warrant, and no routine traffic checking operations have been conducted at the checkpoints within that jurisdiction since the expiration of warrants that were outstanding on the date of the decision.

Accordingly, the issues left unresolved by the decisions in *Ortiz* and *Brignoni-Ponce* merit review by this Court.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1975

Supreme Court, U. S.
FILED
NOV 20 1975
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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1560

UNITED STATES OF AMERICA, *Petitioner*

v.

AMADO MARTINEZ-FUERTE, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR CERTIORARI FILED JUNE 11, 1975
CERTIORARI GRANTED OCTOBER 6, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1560

UNITED STATES OF AMERICA, *Petitioner*

v.

AMADO MARTINEZ-FUERTE, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Docket Entries
[No. 74-1350—Martinez-Fuerte]

DATE	PROCEEDINGS
7-3-74	1—#1&2—Ent ord and fld Ind. JS 2 Bond fixed at $1,500 (XX) (CORP) (CASH)
6-25-74	2—Fld Complt; Def arr; Fed Def Apptd; Prelim Exam cont to 6-28-74 @ 9 am; Bail set @ $1,500 C/S or $1,500 P/S w/sig of prop owner or resp. person employ; w/verif; Gov't mot to commit MAT WIT granted; MAT WIT; David Moon, Jr. Apptd; Bail set @ $1,000 C/S; Bail review set @ 6-28-74 @ 9 am; (HARRIS)
6-28-74	3—Prelim Exam cont to 7-3-74 @ 2 pm; MAT WITS, Bail affirmed @ $1,000 C/S, Bail review cont to 7-3-74 @ 2 pm, assgd to Judge Turrentine (H)
6-28-74	4—Fld $1,500 C/S Bond posted this date; (RIC) (HARRIS)
7-3-74	5—#1—Deft arr T/N & plea NG. Ent ord assigned to JUDGE TURRENTINE & cont to 7-8-74 @ 9 am for mots & trial settg; fld O.H. form; ord bail review as to mat wits affirmed & cont to 7-10-74 @ 9 am. (HARRIS)
7-9-74	6—#1—Fld mot to shorten time; fld ord. (T) Fld not of mot for 7-10-74 @ 9 am & mot to suppress evid; fld P/A in suppt of mot t/w attachment & proof of serv by mail.
	7—#1—Fld deft's mots re voir dire; fld deft's requested instructions.
7-8-74	8—#1—Ent ord jury trial call for 7-10-74 @ 9 am; ord cont to 7-10-74 @ 9 am for mots. (T)
7-11-74	9—Fld ord releasing & exon bond of 2 mat wits. (McCUE) c.c. to mars.
7-10-74	10—#1—Bail review as to mat wits—ent ord affirmed & cont to 7-12-74 @ 9 am before Mag. McCue. (HARRIS)

DATE	PROCEEDINGS
	11—#1—JURY TRIAL—Jurors impaneled & sworn. Swore wits, fld exh. Ent ord mot to supp evid denied; ord ctc 1, 4&5 dism w/prejudice; ord mot for J/S denied; ord cont to 7-11-74 @ 9 am for fur trial. (T)
7-11-74	11—#1—FUR JURY TRIAL—Ent ord & fld verdict of G, cts 2&3; ord jurors polled; ord prob rept waived. Fld govt's requested instructions on 7-10-74. (T)
	12—#1—Ent ord comm to cust AG on cts 2&3 conc for 3 yrs impr; ord purs to 18:3651 serv 6 mos JTI & exec of bal of sent susp & 5 yrs prob. (T) JS-3
	13—#1—Fld judgmt iss cys (Ent 7-11-74)
7-11-74	14—#1—Fld NOTICE OF APPEAL; fld designation of record & fld ord permitting appeal in forma pauperis & apptd Defenders. (T)
	15—#1—Fld $3,500 P/S bail bond on appeal posted 7-11-74. No abst of ord issd upon info from atty that deft not in cust.
7-12-74	16—Ent ord matter placed off calendar as to bail review for mat wits, mat wits released 7-11-74. (McCUE)
7-17-74	17—Fld reporters estimate of costs of transcript. (RUGGLES)
	18—Ent ord reptr's trans in case #14964, USA vs Charles Earl Benson is to be fld in this case & made a part of record on appeal. (T)
*7-18-74	——Fld reptr's trans in case #14964 of 3 volumes, copies only. (RUGGLES)
7-22-74	——Fld orig & 2 cys of rept'r trans of 7-10-74 & 7-11-74. (RUGGLES)

DOCKET ENTRIES
[No. 74-1352—Jiminez-Garcia]

DATE	PROCEEDINGS
7-3-74	1—Ent ord and fld Bond fixed at $2,000 (CORP) (CASH)
6-25-74	2—Fld Complt; Def arr; Fed Def Apptd; Prelim Exam cont to 6-28-74 @ 9am; Bail set @ $2,000 C/S; (HARRIS)
6-27-74	3—Gov't mot to commit mat wits granted; M.L. Cheryl Rhodes Apptd; Bail set @ $1,000 C/S; Bail review set @ 7-3-74 @ 2 pm; (HARRIS)
6-28-74	4—Omnibus Hrg & Prelim Exam cont to 7-3-74 @ 2 pm; (HARRIA)
7–3–74	5—Arr T/N & plea NG all cts—Ent ord bail review as to mat. wits. affirmed & cont to 7-10-74 @ 9 a.m.; ord assgd to JUDGE NIELSEN & cont to 7-8-74 @ 9 a.m. for mots or trial settg. (Harris) O.H. form fld.
7-8-74	6—Ent ord Deft mot to orally join mot to dismiss fld in Mag Case #742592M,—Granted; ord mot submitted, cont to 7-22-74 @ 2 p.m. for ruling on mot & jury trial settg. (N)
7-10-74	7—Bail Review as to mat. wits mod to $1,000P/S + sign of Las Angeles relatives; ord deposition w/out videotape of material witness (under Rule 15) cont to 7-17-74 @ 9 a.m. before Mag Bianchini; Deft counsel objects to deposition w/out videotape; AUSA objects to depositions; counsel for mta. wits. requests deposition. (Harris)
7-17-74	8—Fld by Pltf—Order releasing & exoning bond of mat wits (1 mat. wit)
7-17-74	9—Fld by Pltf—Stipulation re: calling of witnesses w/order attached thereto (Bienchini)
7-17-74	10—Fld by Pltf—Order releasing & exoning bond of mat. wits (1 mat. wit) c.c. to Mars.
7-17-74	11—Ent ord stipulation fld as to M.W.; ord M.W. released this date. (Bienchini)

DATE	PROCEEDINGS
7-22-74	12—HRG MOTS—Ent ord mot to supp evid—Granted; ord mat wits rel; ord mot to dismiss indictment—Denied, ord cont to 10-8-74 @ 9 a.m. for jury trial. (N)
7-23-74	13—BAIL REVIEW—Ent ord reduced to $2,000 P/S. (McCue)
7-25-74	14—Fld $2,000 P/S bond posted 7-23-74.
8-12-74	15—APPEAL by Pltf of Order granting Deft mot to suppress evid w/affid of Jeffrey F. Arbetman & affid of service.
8-13-74	——Fld Reporter s Transcript of proceedings of 7-22-74 (Doroghy A. M. Albright OCR)
8-14-74	16—Fld by Pltf—Designation of record on Appeal.
8-15-74	——Fld Reporter's transcript of proceedings on 7-8-74 (Doroghy A. M. Albright OCR)

Docket Entries
[No. 74-1345—Guillen and Medrano-Barragan]

DATE	PROCEEDINGS
7-3-74	1—#1&2—Ent ord and fld Ind. JS 2 ——#1—Bond Fixed at $2,500 (PS) & Cosigner ——#2— " " " $2,500 C/S
7-1-74	2—Fld Complt; Defs arr; Prelim Exam cont to 7-8-74 @ 9 am: Plea NG (all counts); grand jury proc ord rec. #1—Fed Def Apptd; Bail set @ $2,500 P/S + sig prop owner + proof; #2—Elbert J. Boone Apptd; Bail set @ $2,500 C/S; (INF)
7-2-74	3—MAT WITS: Gov't mot to commit mat wits granted; Robert Ripley Apptd Bail set @ $1,000 C/S; Bail review set for 7-8-74 @ 9 am; (INF)
7-8-74	4—#1 & 2—Arr T/N & plea NG all cts—Ord set for O.H. for 7-11-74 @ 10 a.m.; ord assgd to JUDGE NIELSEN; ord bail review as to mat. wits. affirmed & cont to 7-11-74 @ 10 a.m. (Inf)
7-5-74	5—Fld correspondence by atty Ripley to Magistrate.
7-11-74	6—#1, 2—O. form fld by both; Ent ord Assgd to Judge NIELSEN 7-15-74 @ 9 am for Dispo or JTS. (INF)
7-15-74	7—#1 & 2—LODGED & Fld stip. MOTS—Oral mot to suppress aliens—submitted; cont'd to 7-17-74 @ 1:30 p.m. for hrng ruling on mot & Bail Review & JTS. Ord mot wits released. 8—#1—Fld waiver of deft's presence. 9—#2—Fld waiver of deft's presence.
7-16-74	10—#1&2—Fld ORD releasing & exonerating bond of mat wits (4), (McCUE) Issd c.c. of ORD to U.S. Mars.
7-17-74	11—#1&2—Ent ord--Trial setting & ruling on submitted mots cont'd to 7-19-74 @ 1:30 p.m. (N)

DATE	PROCEEDINGS
7-19-74	12—#1&2—MOTS—Ent ord hrng mot to supp evid—GRANTED as to all evid. Ordecontid' to 10-8-74 @ 9 a.m. for Jury Trial. (By Bond reduced to O/R/ (N)
	——#2—Deft permitted to travel to Tijuana, Mexico. Ord deported. (N)
7-19-74	13—#1—Fld Personal Recognizance ORD posted & approved on 7-19-74. (McCUE)
	14—#2—Fld Personal Recognizance ORD posted & approved on 7-19-74, (McCUE)
7-30-74	——#1&2—Fld Reporter's Transcript of Proceedings (Orig. +2)
8-9-74	15—#1&2—Fld MOT OF APPEAL by pltf on Judge's ORD granting deft's mot to suppress evid entered on 7-19-74. Fld affidt of JEFFREY F. ARBETMAN t/w affidt of svc by mail thereto.
8-19-74	16—#1&2—Fld pltf's Designation of Record on Appeal.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
May 1974 Grand Jury

UNITED STATES OF AMERICA, *Plaintiff*, v. AMADO MARTINEZ-FUERTE, JOHN DOE, *Defendants*.	No. 74 1350 Criminal INDICTMENT Title 18, U.S.C., Sec. 371; Title 8, U.S.C., Sec. 1324—Conspiracy to Transport and Induce Illegal Entry of Aliens; Title 8, U.S.C., Sec. 1324(a)(2)—Illegal Transportation of Aliens; Title 8, U.S.C., Sec. 1324(a)(4)—Inducing Illegal Entry of Aliens

The grand jury charges:

COUNT ONE

Beginning at a date unknown to the grand jury and continuing up to and including June 24, 1974, in the Southern District of California, defendant(s) AMADO MARTINEZ-FUERTE and JOHN DOE and others unknown, unlawfully, willfully and knowingly did combine, conspire, and agree together and with each other, and with divers other persons unknown to the grand jury to violate certain laws of the United States, to wit, to violate Title 8, United States Code, Section 1324.

It was a part of the said conspiracy that the defendant(s) and others would willfully and knowingly encourage and induce, and attempt to encourage and induce, directly and indirectly, the entry into the United States of aliens not lawfully entitled to enter or reside within the United States.

It was further a part of the said conspiracy that the defendant(s) and others would, intentionally and knowingly, bring into the United States alien(s) not duly admitted

by an immigration officer and not lawfully entitled to enter or reside within the United States, and attempts so to do.

It was further a part of the said conspiracy that the defendant(s) and others would willfully and knowingly conceal, harbor and shield, and attempt to conceal, harbor and shield from detection, such aliens referred to in the above paragraph.

It was further a part of the said conspiracy that the defendant(s) and others would transport and move, and attempt to transport and move, aliens within the United States by means of transportation and otherwise, knowing them to be in the United States in violation of law, and in furtherance of such violation of law, and knowing or having reasonable grounds to believe that their last entry into the United States occurred less than three years prior thereto.

OVERT ACT(S)

In pursuance of the said conspiracy, and to further the objects thereof, the following overt act, among others, was committed in the Southern District of California:

1. On or about June 25, 1974, defendant AMADO MARTINEZ-FUERTE drove a vehicle in the Southern District of California.

2. On or about June 24, 1974, defendant AMADO MARTINEZ-FUERTE met with codefendant JOHN DOE in San Ysidro, California, within the Southern District of California

COUNT TWO

On or about June 24, 1974, within the Southern District of California, defendants AMADO MARTINEZ-FUERTE and JOHN DOE, knowing that an alien, namely,

JUANA PEREZ-PEREZ

was then in the United States in violation of law and, having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior to the aforesaid date, did transport and move, and attempt to transport and move, said alien within the United States, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT THREE

On or about June 24, 1974, within the Southern District of California, defendants AMADO MARTINEZ-FUERTE and JOHN DOE knowing that an alien, namely,

Ernestina Martinez-Sanchez

was then in the United States in violation of law and, having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior to the aforesaid date, did transport and move, and attempt to transport and move, said alien within the United States, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT FOUR

Title 8, U.S.C., Sec. 1324(a)(4)

On or about June 24, 1974, defendant(s) AMADO MARTINEZ-FUERTE and JOHN DOE wilfully and knowingly encouraged and induced, and attempted to encourage and induce, the entry into the United States at a place near San Ysidro, California, within the Southern District of California, from Mexico, of

JUANA PEREZ-PEREZ

an alien, who was not lawfully entitled to enter and reside within the United States, and thereafter, said defendant was first found in the Southern District of California; in violation of Title 8, United States Code, Section 1324(a)(4).

COUNT FIVE

Title 8, U.S.C., Sec. 1324(a)(4)

On or about June 24, 1974, defendant(s) AMADO MARTINEZ-FUERTE and JOHN DOE wilfully and knowingly encouraged and induced, and attempted to encourage and induce, the entry into the United States at a place near San Ysidro, California, within the Southern District of California, from Mexico, of

ERNESTINA MARTINEZ-SANCHEZ

an alien, who was not lawfully entitled to enter and reside within the United States, and thereafter, said defendant

was first found in the Southern District of California; in violation of Title 8, United States Code, Section 1324(a)(4).

A TRUE BILL:
/s/ HOWARD C. BRIGGS
Foreman

Harry D. Steward
United States Attorney

by /s/ DONALD F. SHANAHAN
Donald F. Shanahan
Asst. U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
May 1974 Grand Jury

UNITED STATES OF AMERICA, *Plaintiff*, v. JOSE JIMINEZ-GARCIA, *Defendant*.	No. 74 1352 Criminal INDICTMENT Title 18, U.S.C., Sec. 371; Title 8, U.S.C., Sec. 1324—Conspiracy to Transport Alien; Title 8, U.S.C., Sec. 1324 (a)(2) — Illegal Transportation of Alien

The grand jury charges:

COUNT ONE

Beginning at a date unknown to the grand jury and continuing up to and including June 24, 1974, in the Southern District of California, defendant JOSE JIMINEZ-GARCIA and other persons unknown to the grand jury unlawfully, willfully and knowingly did combine, conspire, and agree together and with each other, and with divers other persons unknown to the grand jury to violate certain laws of the United States, to wit, to violate Title 8, United States Code, Section 1324.

It was a part of the said conspiracy that the defendant(s) and others would willfully and knowingly encourage and induce, and attempt to encourage and induce, directly and indirectly, the entry into the United States of aliens not lawfully entitled to enter or reside within the United States.

It was further a part of the said conspiracy that the defendant(s) and others would, intentionally and knowingly, bring into the United States an alien not duly admitted by an immigration officer and not lawfully entitled to enter or reside within the United States, and attempt so to do.

It was further a part of the said conspiracy that the defendant(s) and others would willfully and knowingly conceal, harbor and shield, and attempt to conceal, harbor and shield from detection, such aliens referred to in the above paragraph.

It was further a part of the said conspiracy that the defendant(s) and others would transport and move, and attempt to transport and move, aliens within the United States by means of transportation and otherwise, knowing them to be in the United States in violation of law, and in furtherance of such violation of law, and knowing or having reasonable grounds to believe that their last entry into the United States occurred less than three years prior thereto.

OVERT ACT(S)

In pursuance of the said conspiracy, and to further the objects thereof, the following overt act, among others, was committed in the Southern District of California:

On or about June 24, 1974, defendant JOSE JIMINEZ-GARCIA transported Alfonso Torres-Leon, an illegal entrant alien, in a vehicle in the Southern District of California.

COUNT TWO

On or about June 24, 1974, within the Southern District of California, defendant JOSE JIMINEZ-GARCIA knowing that an alien, namely,

ALFONSO TORRES-LEON

was then in the United States in violation of law and, having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior to the aforesaid date, did transport and move, and attempt to transport and move, said alien within the United States, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

A TRUE BILL:
/s/ HOWARD C. BRIGGS
Foreman

Harry D. Steward
United States Attorney

by /s/ DONALD F. SHANAHAN
Donald F. Shanahan
Asst. U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
May 1974 Grand Jury

UNITED STATES OF AMERICA, *Plaintiff,* v. RAYMOND RANGEL GUILLEN, FERNANDO MEDRANO-BARRAGAN, *Defendants.*	No. 74 1345 Criminal INDICTMENT Title 18, U.S.C., Sec. 371; Title 8, U.S.C., Sec. 1324—Conspiracy to Transport and Induce Illegal Entry of Aliens; Title 8, U.S.C., Sec. 1324(a)(2)—Illegal Transportation of Aliens; Title 8, U.S.C., Sec. 1324(a)(4)—Inducing Illegal Entry of Aliens

The grand jury charges:

COUNT ONE

Beginning at a date unknown to the grand jury and continuing up to and including June 28, 1974, in the Southern District of California, defendant(s) RAYMOND RANGEL GUILLEN and FERNANDO MEDRANO-BARRAGAN and others unknown, unlawfully, willfully and knowingly did combine, conspire, and agree together and with each other, and with divers other persons unknown to the grand jury to violate certain laws of the United States, to wit, to violate Title 8, United States Code, Section 1324.

It was a part of the said conspiracy that the defendant(s) and others would willfully and knowingly encourage and induce, and attempt to encourage and induce, directly and indirectly, the entry into the United States of aliens not lawfully entitled to enter or reside within the United States.

It was further a part of the said conspiracy that the defendant(s) and others would, intentionally and knowingly, bring into the United States alien(s) not duly admitted by an immigration officer and not lawfully entitled to enter or reside within the United States, and attempt so to do.

It was further a part of the said conspiracy that the defendant(s) and others would willfully and knowingly conceal, harbor and shield, and attempt to conceal, harbor and shield from detection, such aliens referred to in the above paragraph.

It was further a part of the said conspiracy that the defendant(s) and others would transport and move, and attempt to transport and move, aliens within the United States by means of transportation and otherwise, knowing them to be in the United States in violation of law, and in furtherance of such violation of law, and knowing or having reasonable grounds to believe that their last entry into the United States occurred less than three years prior thereto.

OVERT ACT(S)

In pursuance of the said conspiracy, and to further the objects thereof, the following overt act, among others, was committed in the Southern District of California:

1. On or about June 28, 1974, defendant RAYMOND RANGEL GUILLEN drove a vehicle within the Southern District of California.

2. On or about June 28, 1974, defendant FERNANDO MEDRANO-BARRAGAN entered the United States within the Southern District of California.

COUNT TWO

On or about June 28, 1974, within the Southern District of California, defendants RAYMOND RANGEL GUILLEN and FERNANDO MEDRANO-BARRAGAN knowing that an alien, namely,

CANDELARIO CAMPOS-MADRID

was then in the United States in violation of law and, having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior to the aforesaid date, did transport and move, and attempt to transport and move, said alien within the United

States, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT THREE

On or about June 28, 1974, within the Southern District of California, defendants RAYMOND RANGEL GUILLEN and FERNANDO MEDRANO-BARRAGAN knowing that an alien, namely,

MIGUEL ANGEL ESTRADA-ESPINOSA

was then in the United States in violation of law and, having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior to the aforesaid date, did transport and move, and attempt to transport and move, said alien within the United States, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT FOUR

On or about June 28, 1974, within the Southern District of California, defendants RAYMOND RANGEL GUILLEN and FERNANDO MEDRANO-BARRAGAN knowing that an alien, namely,

MARCOS PENA-AISPURO

was then in the United States in violation of law and, having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior to the aforesaid date, did transport and move, and attempt to transport and move, said alien within the United States, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT FIVE

On or about June 28, 1974, within the Southern District of California, defendants RAYMOND RANGEL GUILLEN and FERNANDO MEDRANO-BARRAGAN knowing that an alien, namely,

TERESA ESQUEDA-VELASCO

was then in the United States in violation of law and, having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior to the aforesaid date, did transport and move, and attempt

to transport and move, said alien within the United States, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT SIX

Title 8, U.S.C., Sec. 1324(a)(4)

On or about June 28, 1974, defendant(s) RAYMOND RANGEL GUILLEN and FERNANDO MERRANO-BARRAGAN wilfully and knowingly encouraged and induced, and attempted to encourage and induce, the entry into the United States at a place near San Ysidro, California, within the Southern District of California, from Mexico, of Candelario Campos-Madrid an alien, who was not lawfully entitled to enter and reside within the United States, and thereafter, said defendant(s) were first found in the Southern District of California; in violation of Title 8, United States Code, Section 1324(a)(4).

COUNT SEVEN

Title 8, U.S.C., Sec. 1324(a)(4)

On or about June 28, 1974, defendant(s) RAYMOND RANGEL GUILLEN and FERNANDO MEDRANO-BARRAGAN wilfully and knowingly encouraged and induced, and attempted to encourage and induce, the entry into the United States at a place near San Ysidro, California, within the Southern District of California, from Mexico, of

MIGUEL ANGEL ESTRADA-ESPINOSA

an alien, who was not lawfully entitled to enter and reside within the United States, and thereafter, said defendant(s) were first found in the Southern District of California; in violation of Title 8, United States Code, Section 1324(a)(4).

COUNT EIGHT

Title 8, U.S.C., Sec. 1324(a)(4)

On or about June 28, 1974, defendant(s) RAYMOND RANGEL GUILLEN and FERNANDO MEDRANO-BARRAGAN wilfully and knowingly encouraged and induced, and attempted to encourage and induce, the entry into the United States at a place near San Ysidro, Cali-

fornia, within the Southern District of California, from Mexico, of

MARCOS PENA-AISPURO

an alien, who was not lawfully entitled to enter and reside within the United States, and thereafter, said defendant(s) were first found in the Southern District of California; in violation of Title 8, United States Code, Section 1324(a)(4).

COUNT NINE

Title 8, U.S.C., Sec. 1324(a)(4)

On or about June 28, 1974, defendant(s) RAYMOND RANGEL GUILLEN and FERNANDO MEDRANO-BARRAGAN wilfully and knowingly encouraged and induced, and attempted to encourage and induce, the entry into the United States at a place near San Ysidro, California, within the Southern District of California, from Mexico, of

TERESA ESQUEDA-VELASCO

an alien, who was not lawfully entitled to enter and reside within the United States, and thereafter, said defendant(s) were first found in the Southern District of California; in violation of Title 8, United States Code, Section 1324(a)(4).

A TRUE BILL:
/s/ HOWARD C. BRIGGS
Foreman

Harry D. Steward
United States Attorney

by /s/ DONALD F. SHANAHAN
Donald F. Shanahan
Asst. U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* v. JOSE JIMINEZ-GARCIA, *Defendant.*	Criminal No. 74-1352LN STIPULATION

IT IS HEREBY STIPULATED by and between the Plaintiff, United States of America, through its counsel of record, and the defendant, JOSE JIMINEZ-GARCIA, through his counsel of record, Robert Boles, as follows:

1. That if Border Patrol Agents McKinlay and Winn were called as witnesses they would testify as follows:

a) That on June 24, 1974, the defendant was the driver of a 1968 Chevrolet which was stopped at the San Clemente checkpoint; that one male alien was riding in the front seat of the vehicle the defendant was driving.

2. That if ALFONSO TORRES-LEON were called as witness he would testify as follows:

a) That he is a citizen of Mexico without any legal right to be in the United States.

b) That he made arrangements with an unknown person in Tijuana to be smuggled into the United States and transported to Los Angeles. That on June 24, 1974, he was guided across the border and to 108 Smythe Street in San Ysidro, California, where he stayed in a room attached to the garage of the residence at that address. That later that day he walked about half a block from the residence where he got into the vehicle which the defendant was driving, and was transported by the defendant north to the point of their apprehension at the San Clemente, California checkpoint.

3. That the above-named alien witness may be released from custody and returned to Mexico, and that this stipulation may be entered into evidence in lieu of his testimony.

4. That this stipulation is being entered into freely and

voluntarily and the defendant understands that he is waiving his right to confront and cross-examine the above-named witness at the motion hearing and trial of this case.

DATED: July 17, 1974

Respectfully submitted

Harry D. Steward
United States Attorney

Stephen G. Nelson
Assistant U. S. Attorney
Chief, Criminal Division

/s/ R. Michael Bruney
R. Michael Bruney
Assistant U. S. Attorney

Attorneys for Plaintiff
United States of America

Jose Jiminez-Garcia
Jose Jiminez-Garcia
Defendant

Robert Boles
Robert Boles
Attorney for Defendant

IT IS SO ORDERED.
DATED: 7/17/74

/s/ Victor E. Bianchini
United States Magistrate

United States District Court
Southern District of California

United States of America, *Plaintiff,* v. Raymond Rangel Guillen and Fernando Medrano-Barragan, *Defendants.*	Criminal Case No. 74-1345 N Magistrate's Docket No. 74-2549M STIPULATION

IT IS HEREBY STIPULATED by and between plaintiff, United States of America, and the defendants, Raymond Rangel Guillen and Fernando Medrano-Barragan, through their respective attorneys of record the Federal Defenders of San Diego, Inc. and Mr. Albert J. Boone, that if the following persons were called to testify they would testify to the following:

1. Mr. Candelario Campos-Madrid states the following:

(i) That he was born in Durango, Mexico and is currently thirty years of age.

(ii) That he lived in Tijuana for one year working as a painter before meeting an unidentified man in Tijuana with whom he made arrangements to be transported to the Los Angeles area for financial consideration.

(iii) That he crossed the border at a beach with two other men and were following a young man later identified as Fernando Medrano-Barragan aka Alfonso Magana-Delgado and a young woman.

(iv) That after they reached a highway in the United States a car arrived and he and the two other men entered the trunk of the vehicle; the trunk being opened by the person later identified as Raymond Rangel Guillen aka Raymond Sanchez-Sanchez.

(v) He would further testify that he had $1.00 on his possession when apprehended, that he has no family in this country, nor has he any papers which entitle him to enter this county. Further, that he made his entry into the United States at a place other than designated by the

Immigration Service by crossing at the beach area near Tijuana, B.C. Mexico.

2. Mr. Marcos Pena-Aispuro states the following:

(i) That he was born in Durango, Mexico and is forty-five years of age.

(ii) That he travelled to Tijuana approximately twenty-two days prior to his arrest on 28 June 1974 and was unable to secure employment.

(iii) During this period of time in Tijuana he met a man near the central bus station who said that he would transport Mr. Pena to Los Angeles if Mr. Pena would pay him $200.00 after reaching Los Angeles. Arrangements were made that this unidentified man would meet him on the United States side of the border but never did. Mr. Pena walked through the hills at night following man who the person he had made his arrangements with told him to follow. This man was later identified as being Fernando Medrano-Barragan aka Alfonso Magana-Delgado who was travelling with a young lady. After reaching a highway Mr. Pena was placed in a trunk by a person later identified as Raymond Rangel Guillen aka Raymond Sanchez-Sanchez and did not leave the trunk of the vehicle until apprehended by the border patrol agents at the San Clemente check-point. Mr. Pena would further state that he did not know any of the persons who set up the arrangements or the other passengers.

(iv) Mr. Pena testifies that he is a citizen of Mexico and has no legal papers with which to enter the United States and entered on 28 June 1974 by entering the United States at a place other than designated by the United States Immigration Service i.e., at the beach at Tijuana, B.C. Mexico.

3. Teresa Esqueda-Velasco testifies:

(i) That she is eighteen years of age and a citizen of Mexico born in Guadalupe Jalisco.

(ii) She would further testify that she married Fernando Medrano-Barragan aka Alfonso Magana-Delgao on 27 June 1974.

(iii) She would further state that she did not know if her husband made prearrangements and knew nothing about any arrangements if any were made.

(iv) That she was awoken out of her wedding bed by another person who asked if they wanted to make a try at entering the United States. Her husband got out of bed and went to talk to the friend and then told her to dress and they took a bus from downtown Tijuana to the beach area, walked across the border at the beach, met other friends, and they all walked across a highway.

(v) Miss Esqueda then fell asleep by the side of the road- and the next thing she knew a car pulled up and she was getting into the vehicle with her husband in the front seat next to her.

(vi) Teresa Esqueda-Valasco would testify that she has no legal papers which would enable her to enter the United States legally, and that her entry was made at a place other than designated by the Immigration Service in the early morning hours of 28 June 1974.

4. It is further stipulated that Miguel Angel Estrada-Espinosa is a citizen of Mexico with no legal papers authorizing him to be in the United States. That he entered the United States at a place other than designated by the U. S. Immigration Service by crossing in the beach area at Tijuana, B.C. Mexico in the early hours of June 28, 1974, with Marcos Pena-Aispuro and Candelario Campos-Madrid.

SO STIPULATED:

Harry D. Steward
United States Attorney

/s/ Jeffrey F. Arbetman
Jeffrey F. Arbetman
Assistant United States Attorney
Attorney for Plaintiff United States of America

/s/ Raymond Rangel-Guillen
Raymond Rangel-Guillen

/s/ Michael McCabe
Michael McCabe
Federal Defenders of San Diego, Inc.
Attorney for Raymond Rangel-Guillen

/s/ Fernando Medrano-Barragan
Fernando Medrano-Barragan

/s/ ALBERT J. BOONE
Albert J. Boone
Attorney for Fernando Medrano-Barragan

SO ORDERED: JULY 15, 1974
/s/ LELAND C. NIELSEN
Honorable Leland C. Nielsen
District Court Judge
Southern District of California

[Excerpts from Suppression Hearing in No. 74-2462 (Martinez-Fuerte)]

SAN DIEGO, CALIFORNIA; WEDNESDAY, JULY 10, 1974; 10.45 A.M.

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(The following proceedings held in chambers.)

THE COURT: May the record reflect we are in chambers.

The defendants in this case were arraigned on Monday of this week. Today is the day set for trial, and the Court at that time set a motion to suppress, for the hearing to be before the trial this morning. Both counsel have filed briefs with me, which I have read on the question of quashing the subpoenas, or the special warrant, or what do we call those, Mr. Sevilla?

MR. SEVILLA: Well, I think the issue, for all intents and purposes today, is whether or not that warrant is valid, and whether or not the stop which occurred in this case, and the inspection that occurred because of that warrant, and based on that warrant, and it's our contention that that is what the government relies upon to justify the stop at San Clemente in this case; and that since the warrant, in our opinion, is invalid, that the stop was illegal, and the fruit of the subsequent inspection is also tainted.

THE COURT: You are satisfied with the brief you filed to set forth your position in this matter?

MR. SEVILLA: Yes.

THE COURT: And the government?

MR. MEYERS: Your Honor, I think that the brief of the pleadings we filed were in answer to the brief in the Dora Soto case. I think it is the same brief the defense filed, and if that is so, we are satisfied with our response.

THE COURT: I take it you don't wish to make any argument on it?

MR. PETERSON: Additionally, for the record in this case, I would like to, with the Court's permission, file additional documents which support the warrant of inspection.

One is an affidavit which was submitted by Robert D. McCord, who was the Assistant Chief Patrol Agent, and who filed an affidavit in support of the warrant of inspection issued by Magistrate Infante on June 22nd of this year.

The second is also another affidavit by Robert D. McCord in support of that warrant of inspection.

The third was an affidavit filed by Richard Wischkaemper, who is the Assistant Regional Commissioner of the Border Patrol, and that affidavit was filed in support of the warrant of inspection.

Additionally there was an affidavit signed by Gene E. Harris, who was the Patrol Agent in Charge of the San Clemente Border Patrol checkpoint, who filed an affidavit; and if I'm wrong, Mr. Meyers will correct me, was filed giving the results of the warrant of inspection at the traffic checkpoint.

MR. MEYERS: That is correct.

THE COURT: I can hear you.

MR. PETERSON: And, also, the warrant of inspection itself, which was issued by Magistrate Infante.

And, lastly, is the return of the warrant, which was signed by Gene E. Harris, the Agent in Charge at San Clemente.

I ask that they be filed as part of this case.

THE COURT: Do you wish to respond, Mr. Sevilla?

MR. SEVILLA: I would ask if there was a copy of the actual warrant itself. We would submit it.

MR. PETERSON: Yes. That is included. I mentioned that.

MR. MEYERS: Also, I might add that the Magistrate stated in the warrant that he relied on these affidavits that Mr. Peterson just referred to, plus he relied on the actual certified transcript of the hearings before your Honor in the Baca case.

I have asked the reporter today to provide me with another copy of the full transcript to lodge it with the Court as an exhabit. I'm sure your Honor has a copy. I thought it would be more convenient in case there was an appeal in this case to have a full certified transcript filed in the record.

THE COURT: Very well. Mr. Peterson, you may file the documents. They will be made part of the record.

Mr. Sevilla, if you have any answering documents you wish to file, I'll permit you to file those to perfect your record.

MR. SEVILLA: I think that the warrant itself, and the affidavits, which were before the Magistrate when he issued the inspection warrant, should be filed with the Court.

I would object to any material that is extraneous to what materials the Magistrate had before him when he issued this inspection warrant, because the warrant is going to rise or fall based upon the materials that were before the Magistrate at the time he issued it; and, so, that would probably take into account any responsive affidavits or returns, and I would object to those being entered.

THE COURT: Your objection is noted. They will be filed for whatever——

MR. SEVILLA: Also, then——

THE COURT: —purpose they may serve.

MR. SEVILLA: With respect to the Baca hearing transcript, if the transcripts are to be admitted, I would then ask, also, that all exhibits filed in that case be filed, submitted for appellate purposes, as well as in that hearing——

MR. MEYERS: Well, I'm not sure I have any objection. It seems inconsistent with what Mr. Sevilla just said. He wants to limit the evidence to what the Magistrate had in front of him. I'm not sure he had the exhibits in front of him.

THE COURT: Let's leave that to another day. The defendants haven't been convicted. There may not be an appeal, and if they are convicted, and there is an appeal, I'll hear you further on what should be filed.

MR. SEVILLA: Your Honor, I would state that in arguing to support my motion, that this innovative procedure that has been inaugurated by the United States Attorney's Office and Magistrate Infante is just that there is no precedence for it. As I pointed out in my points and authorities, there is even a question whether the Magistrate has the authority to issue "an animal labeled inspection warrant," and the Supreme Court recently, just two weeks ago, expressly limited the authority of Magistrates to go beyond the bounds of what was actually delegated to the Magistrate by statute or local rule.

So, I would object to, of course, the warrant on that grounds; and with respect to the Baca opinion, which the Magistrate relied upon, I would submit that the recent decisions of the Ninth Circuit have overruled Baca; and we just received one this morning, United States versus Laura Elena Esquer-Rivera.

THE COURT: Was it one of my cases?

MR. SEVILLA: It was consolidated at the Baca hearing.

In this they held that the Ocotillo checkpoint was not shown to be located at a functional equivalent of the border, and is not a functional equivalent of the border.

In the footnote they indicate the ruling of Baca, although, "in Baca the District Court for the Southern District of California held that the Ocotillo checkpoint, as well as all other immigration checkpoints operated within the Southern District, were at functional equivalents of the border. The Baca opinion, however, was written without the benefit of our later decision in Bowen."

The Ninth Circuit has overruled whatever authority the Magistrates had in relying upon the Baca opinion or finding.

THE COURT: I think, counsel, the Magistrate was relying on Baca, not the ultimate results, but the statistics that were contained therein, and this is a question that will no doubt be decided by the Supreme Court. We have to get it on its way, if you are both satisfied with your record.

MR. SEVILLA: I would say that no doubt your Honor is correct. The appellate court will be deciding the ultimate issue in this case. I just think it is wrong for my client to bear the burden, should he be convicted at this jury trial, to go forward with the appeal. The government has inaugurated this otherwise illegal procedure, but for the inspection warrant, affidavits, and evidence, and should have the burden of taking it on appeal. I don't think my client should have the burden of going through the jury trial now, and then having the evidence come in, which would or should be suppressed, and then going through with an appeal to the Ninth Circuit.

The government has a remedy under Title 18, Section 3731, to appeal within thirty days of your Honor's ruling suppressing the evidence, because it is deemed an illegal stop. I don't think my client should bear the burden. The government has inaugurated this unlawful instrument into the laws, and therefore should have the burden of sustaining it. I don't think they came close in this case.

THE COURT: Well, that is what we are going to find out, Mr. Sevilla.

I'll deny your motion, and we will proceed with the trial.

I understand that you are being compensated under the Criminal Justice Act. Your client is not out any dollars from his own pocket, only the taxpayers'.

MR. MEYERS: Could I ask a question of Mr. Sevilla. The question I have, in the pleadings one of the arguments that you make is that the Magistrate does not have the power to issue such a warrant. Do you mean to say that a judge, federal judge could issue such a warrant, or neither a judge or a Magistrate could issue such a warrant?

MR. SEVILLA: I'm not going to give an advisory opinion of what the judge can do.

MR. MEYERS: You can tell us what your argument is.

MR. SEVILLA: We will find it out in the Ninth Circuit. In the Ninth Circuit it will not be whether Judge Turrentine or Justice Powell can, the issue will be whether the Magistrate, whose duties are solely limited to state and local rule, can issue such an inspection warrant. So, I'll defer any opinion on that issue.

I would like one thing to be done, and that is I think the government should stipulate that the stop in this case was due to the inspection warrant so that there is no question on appeal that the issue is precisely framed.

THE COURT: Mr. Peterson. Mr. Meyers.

MR. MEYERS: I think the government will stipulate that there was no evidence that would support a founded suspicion, but I think the government will still maintain we had a statutory right to stop the vehicle, and in addition, we had a legally authorized warrant.

THE COURT: Well, that answers the question. There was no founded suspicion as such. They were relying on the statutory right and the inspection warrant.

MR. SEVILLA: So Mr. Meyers is saying that you are relying on the statutory authority which you were found not to have in the various decisions such as Bowen, Juarez-Rodriguez, Brignoni-Ponce?

MR. MEYERS: This Circuit and in other circuits, they have found a statutory right even without a warrant, and in this situation we had a warrant.

THE COURT: It will be interesting to see, seven to six one way or the other.

* * * * * *

MR. PETERSON: Your Honor, further, after assessing the evidence that the government is going to present in its case in chief, I would move to dismiss the counts of the indictment that have to do with inducing the illegal entry of the aliens in this case. I don't recall the actual——

THE COURT: Mr. Sevilla has a copy of the indictment.

MR. SEVILLA: That would be Counts Four and Five.

MR. PETERSON: I would move to dismiss those two counts, Four and Five.

THE COURT: I assume Mr. Sevilla has no objection.

MR. SEVILLA: As long as they are dismissed with prejudice, your Honor, I have no objection.

MR. PETERSON: I have no objection to them being dismissed with prejudice.

THE COURT: Very well. They are so dismissed.

* * * * * *

[Excerpts from Suppression Hearing in
No. 74–2680 (Jimenez-Garcia)]

SAN DIEGO, CALIFORNIA, MONDAY, JULY 8, 1974, AT 3:00 P.M.

THE CLERK: No. 13 on calendar, Case No. 74–1352, United States of America v. Jose Jiminez-Garcia, for motion setting.

40 on calendar, United States of America v. Fermin Rayas-Melendez, Guadalupe Gonzalez-Valenzuela, Lucia Ayala-Perez; for filing consent, filing information, arraignment and plea, and hearing motions and jury trial setting.

MR. MANGAN: Frank Mangan, Federal Defenders on behalf of Jose Jiminez-Garcia. He's now present in court in custody.

MR. CLEARY: John Cleary, Federal Defenders, on behalf of the defendants Fermin Rayas-Melendez, Guadalupe Gonzalez-Valenzuela, and Lucia Ayala-Perez.

MR. MCKESSON: Charles B. McKesson for defendant Dora Soto, who's present in court.

THE CLERK: That will be 41 on calendar, Case No. 74–1300 for further proceedings.

MR. MANGAN: Your Honor, for the record, in the Jiminez case, we're joining orally in the motions that were filed by the Federal Defenders Office on behalf of the material witnesses. Our motions would be identical.

THE COURT: Very well. You may so join.

Do you have anything to add to your previous matter, Mr. McKesson?

MR. MCKESSON: Your Honor, I received a half hour ago the twenty-four-page memo of the government. I have read it and I would have a comment or two thereon, but I'm sure that when the Court does have an opportunity to read it, at that time it might be more appropriate.

THE COURT: I have glanced through it also.

Do you have anything to add, Mr. Meyers, to your Memorandum?

MR. MEYER: I don't believe so, your Honor. I think this case has become a weighty matter in more than one way and I think our pleadings fully cover both sides of the question.

THE COURT: Mr. Cleary?

MR. CLEARY: There were just two small points that I would just briefly remark on in response to the government's pleadings.

First, as somewhat of a Freudian slip, Footnote 1, in the sense that we in the law practice, we lawyers are bound by the rulings of judges and judges of the district courts are bound by the rulings of the Courts of Appeal, and although it is nice to speculate as to the ultimate outcome in the government's efforts to overrule Brignoni, Ponce—and in that respect as an advocate, I can respect their reference—however, I cannot ask them to ask this Court to deviate from the established precedents of this Circuit.

Further, I would point out to the Court a very anomalous situation in which Justice White dissented in the Wade and Gilbert cases, but in Kirby v. Illinois he dissented and he said:

> Although I dissented in Wade and Gilbert, I am bound by that precedent and am now dissenting from the Courts' erosion of counsel in preindictment situations.

The second point I would make is that although the magistrate and counsel in counsel for the government's request is ingenious in the sense of trying to create a warrant that doesn't otherwise exist, I would point out that we neither have statutory authority nor modification of Rule 41(c) to justify the provision here. Therefore, under the existing precedents, I feel that the Court has no other choice before it and I speak to the precedents of our history in the sense of the Fourth Amendment, Supreme Court precedents, and the precedents of the Ninth Circuit.

MR. MEYERS: Your Honor, I think the position of the government is not that we're asking this Court to review the Ninth Circuit decisions that have been handed down in the last sixty days. I think basically what our motion is, is quite simple. We're just asking this Court to follow the suggestion of Justice Powell in Almeida-Sanchez which was concurred in by the four dissenting judges and, as Mr. Justice White—as Mr. Cleary mentioned his name—said in Almeida-Sanchez: I agree with Mr. Justice Powell that such a warrant would satisfy the Fourth Amendment, and I would expect such warrants would be readily issued.

Well, I don't know how readily this warrant was issued.

I know it's been issued and it's been issued on probable cause, and I think that when you have five——

THE COURT: On alleged probable cause.

MR. MEYERS: We would like to submit we do think we do have probable cause here and our basic position is that when five judges of the Supreme Court have told us what their view is, that I'm sure they just don't write these views to be overlooked in the future. They are writing these views in order to give us guidance, and I think the guidance here is for us to take the course that we have taken, and I think that the overwhelming problem in this district and in Southern California as a whole regarding the great illegal alien problem is such that Mr. Justice Powell will be, I think, most ready to vote with Mr. Justice White and affirm this warrant.

THE COURT: Mr. McKesson?

MR. MCKESSON: Your Honor, the difficulty with the government's position based on a return to the warrant and all of the other material therein is that it attempts to justify a previously unheard of device by the facts found afterwards. In effect it's saying that the end justifies the means; that's the long and the short of the matter.

Furthermore, the government has suggested that the claim of defendants, now defendants plural, that the government's application for the issuance of this warrant is an attempt to get around, to sneak around the clear holdings of the Ninth Circuit, as Mr. Cleary pointed out. The government says that is a frivolous argument. I frankly see nothing frivolous in it whatsoever. It's a very serious argument. As Mr. Cleary pointed out, there's no statutory authority for this kind of warrant whatsoever. It is conceivable that Justice Powell in his concurring opinion to Almeida-Sanchez, joined in by the dissenting votes as to the result—it is not clear from the dissent whether all four Justices were in concurrence with this warrant procedure outlined by Justice Powell, but it is conceivable, I'd point out, that what Justice Powell was suggesting was that, as with every other kind of administrative point as in Camera and See, there could be enabling legislation enacted and I would submit to the Court that that would be the proper method for the government if it so desired to pursue. Then, if enabling legislation were enacted, the government could challenge that legislation, or the defendants would challenge

that legislation, depending on the circumstances, and then it would be properly before the Court. But merely to manufacture out of whole cloth or to resurrect a writ of assistance of general warrant on an obiter dictum statement in a concurrent opinion seems to me to be beyond the pale and clearly unconstitutional.

THE COURT: Well, I think all you gentlemen know how I feel personally about the Almeida-Sanchez decision and the Ninth Circuit ones, and Bowen, Peltier, and Brignoni, Ponce. I think they are all wrong except Peltier, but I'm really concerned very much about this situation having to follow those decisions and, not having had the opportunity to go over the government's opposition in anything more than the most brief way, these motions are all taken under submission and they'll be decided not later than the 22d. But I just don't feel at this time that I can decide them without an opportunity to study at length the government's position.

As indicated, at the moment by inclination is to grant the motions, but having in mind that I am completely in sympathy with the end which the government seeks, it's difficult for me to say that the means they have used are completely outside the pale, so the motions are all under submission.

* * * * * *

SAN DIEGO, CALIFORNIA, MONDAY, JULY 22, 1974, AT 2:00 P.M.

THE CLERK: No. 48 on calendar, Case No. 74–1352, United States of America v. Jose Jimenez-Garcia, ruling on motions and jury trial setting.

MR. SEVILLA: Charles Sevilla, Federal Defenders, for Jose Jimenez-Garcia, who should be present in custody.

Your Honor, I believe the stipulations as to the testimony of the witnesses has already been filed.

THE COURT: That's right, so your motion to suppress is granted and the matter is set for trial October 8.

Isn't that the day I set the others?

MR. SEVILLA: I'm not sure.

THE CLERK: Yes, your Honor.

THE COURT: October 8, so that the government may take their appeal before that time.

MR. SEVILLA: Thank you, your Honor.

THE CLERK: Is the motion to dismiss continued until then?

THE COURT: It is denied.

* * * * * *

[Excerpts from Suppression Hearing in
No. 74–2714 (Guillen and Medrano-Barragan)]

SAN DIEGO, CALIFORNIA, MONDAY JULY 15, 1974, AT 3:25 P.M.

THE CLERK: No. 5 on calendar, Case No. 74–1345, United States of America v. Raymond Rangel Guillen and Fernando Medrano-Barragan for disposition or jury trial setting.

MR. MCCABE: Michael McCabe, Federal Defenders for Rangel Guillen, who is in custody.

MR. BOONE: Elbert Boone for Medrano-Barragan, who's in custody.

MR. MCCABE: Both defendants are now before the Court.

At this time, your Honor, we would move orally to suppress the aliens that were found in the search here and I would ask to incorporate by reference the Points and Authorities filed by defense counsel and by our office in the case of United States v. Nora Soto which is before the Court.

I believe Mr. Arbetman will stipulate that the only grounds for the stop and search of the vehicle in this case was the aerial search warrant.

THE COURT: Warrant of detention. Warrant of inspection.

MR. ARBETMAN: So stipulated.

We will stipulate that there was a search warrant in existence at the time of this case for the checkpoint at San Clemente.

MR. BOONE: I will word my motion to suppress all fruits of the search from the stop.

THE COURT: All right. The stipulation may be filed at this point.

All right. The motions are taken under advisement at this point.

* * * * * *

MR. MCCABE: I want to state for the record that it's our understanding that the stipulation will only be used in the event that either the Court denies the motion, or that the Court's ruling in granting the motion is overruled on appeal.

THE COURT: That's right.

* * * * * *

SAN DIEGO, CALIFORNIA, FRIDAY, JULY 19, 1974, AT 1:30 P.M.

THE CLERK: No. 2 on calendar, Case 74–1345, United States of America v. Raymond Rangel Guillen and Fernando Medrano-Barragan, ruling on motions, jury trial setting, and bail review.

MR. MCCABE: Michael McCabe, Federal Defenders, for Raymond Rangel Guillen who's present in court.

MR. BOONE: Elbert Boone for Medrano-Barragan, who's present in custody.

THE COURT: Mr. Boone, have you and your client signed that stipulation as far as the testimony is concerned?

MR. BOONE: Yes, your Honor.

THE COURT: I thought you had but I couldn't remember.

MR. BOONE: We did that Monday.

THE COURT: I thought you had.

I should say in that regard that I think that the United States Supreme Court was wrong as far as Almeida Sanchez is concerned, and that the Ninth Circuit in their en banc opinion in Bowen was wrong, and I have no sympathy at all with their rulings which I must follow, and as far as the warrant of inspection is concerned, I don't think that the government is in a better position now than they were before that so-called aerial search warrant was secured.

As a side issue, I think that there's a real question as to whether the Magistrate has any authority other than that directly given to him, but I'm not making my decision on those grounds. I'm making my decision on the fact or on the grounds that, following the ruling of the Ninth Circuit in Bowen, Peltier, Brignoni and Ponce, and that of the United States Supreme Court in Almeida-Sanchez, there's a violation of the Fourth Amendment in the mere stop at the San Clemente check station.

I should again say that I think that the Ninth Circuit was wrong when they decided Bowen. I agree with Judge Turrentine in his decision in United States v. Baca where he found that the San Clemente check station was a functional equivalent of the border, but I feel impelled and compelled by the decisions of the Circuit in Bowen and by

that of the Supreme Court in Almeida-Sanchez, to say that there was no authority for the stop.

Therefore, all evidence in the case is ordered suppressed.

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[Excerpts from Trial Transcript in No. 74–2462 (Martinez-Fuerte)]

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CORNELIUS NUNN,

called as a witness on behalf of the plaintiff, was sworn, testified as follows:

THE CLERK: Please take the witness stand. State your name, and spell your last name for the record.

THE WITNESS: My name is Cornelius Nunn, N-u-n-n.

DIRECT EXAMINATION

BY MR. PETERSON:

Q. Mr. Nunn, how are you employed?

A. I'm a Border Patrol Agent. San Clemente, California.

Q. And how long have you been in the Border Patrol?

A. Approximately fourteen months, sir.

Q. Prior to that time, what did you do? Were you in law enforcement?

A. No. I was a career officer in the Air Force.

Q. All right. I see. These last fourteen months that you have been in the Border Patrol, have you been at San Clemente during this period of time?

A. Since September of last year.

Q. Since September. All right. Directing your attention, sir, to June 24th of this year, were you on duty on that day?

A. Yes, sir.

Q. Where were you working?

A. I was working on the checkpoint at San Clemente.

Q. All right. At approximately 8:00 o'clock in the morning—evening, where, specifically, were you working?

A. I was in the secondary inspection area.

Q. All right. Where is the secondary inspection area?

A. It's on the side of Interstate 5 on the northbound lane.

Q. All right. And since there is a secondary inspection area, I'll ask you this, is there a primary inspection area?

A. Yes, sir. The primary inspection area is the center of the highway. One agent stands in the center of the highway, inspects traffic, directs certain cars to the secondary

inspection at the side of the road for a more thorough inspection.

Q. All right. At approximately 8:00 o'clock in the evening, who was on primary? Do you recall?

A. Agent Brantley was on the primary area.

Q. All right. Did you see, at approximately 8:00 p.m., Agent Brantley refer to you a 1973 Capri automobile?

A. Yes, sir.

Q. All right. How did he do that? Do you recall seeing that?

A. He motioned with his left hand, and pointed to the secondary area.

Q. All right. Did the car head in your direction?

A. Yes, sir.

Q. All right. What happened when the car arrived at your location?

A. The car stopped. I approached the car from the driver's side, and spoke to the driver, and—to determine his citizenship.

Q. All right. Do you see the driver of that automobile here in the courtroom?

A. Yes, sir.

MR. SEVILLA: I will stipulate to the identity, your Honor.

THE COURT: Very well. Proceed.

BY MR. PETERSON:

Q. All right. What questioning did you ask of him?

A. I asked the driver what his citizenship was. I spoke to him first in English. He didn't seem to understand. I spoke to him in Spanish. I asked him his citizenship. He indicated to me that he was an immigrant. I asked him to show me his papers, which he did.

Q. What did he show you?

A. He showed me an I–151 card, which is what we call a mica.

Q. All right. What does that I–151 card entitle a person to do?

A. This is proof that the person is a legal immigrant in the United States, and with that he has the same rights as a citizen to go and come, and work, and so on.

Q. Do you know what an I–186 card is?

A. Yes, sir.

Q. What is an I–186 card?

A. An I–186 is a local card that is issued to Mexican citizens so that they may come into the United States for a distance of twenty-five miles or up to seventy-two hours.

Q. And at the end of the seventy-two hours, what happens?

A. At the end of the seventy-two hours they have to return to Mexico, unless they get a permit to travel otherwise.

Q. I see. All right. Was there anyone else in the automobile?

A. Yes, sir. Two ladies in the automobile.

Q. Where were they seated?

A. One in front and one in back.

Q. Did you ask them for their citizenship?

A. Yes, sir; I did.

Q. And what was their reply?

A. They indicated to me they were Mexican citizens. I asked them for their papers, if they had papers, and they indicated to me they did not have papers to be in the country legally.

Q. And at that point what, if anything, did you do?

A. At that point I arrested the driver, advised him of his rights.

Q. All right, what did you do with the passengers in the automobile?

A. I left the passengers in the automobile until they were—we took the car over to the office about a hundred yards from the highway. At that point the passengers were taken inside along with the driver into the office.

Q. All right. Now, did you notice—happen to notice the passengers' physical demeanors while they were in the automobile?

A. When the car first pulled up, the passengers appeared tense, were looking straight ahead, more or less. They wouldn't look directly at me until I spoke to them directly.

MR. PETERSON: Nothing further.

MR. SEVILLA: No questions.

THE COURT: You may stand down.

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA v. AMADO MARTINEZ-FUERTE	No. 74-1350— Criminal

On this 11th day of July, 1974 came the attorney for the government and the defendant appeared in person and by counsel, Charles Sevilla of Federal Defenders.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of illegal transportation of aliens, in violation of 8 USC 1324(a)(2), as charged in counts 2 and 3 of the indictment in 5 counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that on counts 2 and 3 to run concurrently the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE YEARS provided, however, pursuant to 18 USC 3651 as amended that said defendant shall be confined in a jail-type or treatment institution for a period of SIX months, and that execution of the remainder of said sentence is suspended and the defendant placed on probation for a period of FIVE years, on condition that he obey all laws, Federal, State and Municipal, and that he comply with all lawful rules and regulations of the Probation Department, and that he not enter Mexico nor approach the Mexican border without permission of the Probation Department.

IT IS ORDERED that the defendant shall remain on his present bond pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of

Footnotes omitted

this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Howard B. Turrentine
HOWARD B. TURRENTINE
United States District Judge
Filed: July 11, 1974
WILLIAM W. LUDDY
Clerk
By /s/ Richard I. Bellman
RICHARD I. BELLMAN
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF AN APPLICATION BY THE UNITED STATES OF AMERICA FOR AN INSPECTION WARRANT FOR THE IMMIGRATION AND NATURALIZATION SERVICE TO OPERATE A FIXED TRAFFIC CHECKPOINT ON INTERSTATE ROUTE 5 FIVE MILES SOUTH OF SAN CLEMENTE, CALIFORNIA	APPLICATION FOR INSPECTION WARRANT

COMES NOW the United States of America in application for a warrant of inspection for the operation of the fixed checkpoint at San Clemente, California, operated by the U. S. Border Patrol. This application is based on the attached affidavits of Robert D. McCord and Richard Wischkaemper and the evidence presented in *United States v. Baca*, Case No. 14656, heard before the Honorable Howard B. Turrentine on November 19, 20 and 21, 1973, and the findings of fact as reported in *United States v. Baca*. 368 F. Supp. 398 (S.D. Cal. 1973).

/s/ Harry D. Steward
HARRY D. STEWARD
United States Attorney

STATE OF CALIFORNIA }
COUNTY OF SAN DIEGO } ss.

AFFIDAVIT

ROBERT D. McCORD, being first duly sworn, deposes and says:

1. I am an Assistant Chief Patrol Agent assigned to the Chula Vista Sector of the United States Border Patrol. I have been employed with the Border Patrol continuously since 1957, except for an eight year period when I was assigned as an investigator with the United States Immigration and Naturalization Service. In the course of my duties I have been assigned in various locations in Texas, Florida, and California. In my present capacity I share responsibility with the Chief Patrol Agent in the administration of the sector and the operations engaged in by 250 officers and 50 auxiliary employees.

2. A key function in our basic strategy is the establishment of highway checkpoints at locations beyond 25 miles from the border, utilizing topographical features and extended highways to permit visual examination of the maximum amount of traffic with a minimum incursion and inconvenience upon the public. The location of the checkpoints are correlated along the entire border and provide an effective secondary line of defense.

3. The existence of the checkpoints is a matter of common knowledge in Mexico and Central America to those persons engaged in the soliciting of persons to be smuggled into the interior United States. Officers in the United States Embassy in El Salvador submitted an official intelligence report through the State Department channels precisely locating the checkpoints in San Clemente and Temecula, California, on the basis of information furnished them by covert sources in El Salvador. Those sources further volunteered the information that admission at the Port of Entry was relatively safe, but clearance through the highway checkpoints presented a hazard. The existence of these traffic checkpoints, therefore, are considered a deterrent to those who would attempt to illegally enter this country from south of our border. Additionally, interviews conducted with illegal aliens apprehended from Central Amer-

ica confirm their knowledge of the highway checkpoints.

4. Attached are Exhibits 1 through 17 revealing that 8,440 aliens were apprehended at the San Clemente checkpoint during the first five months of 1973 and 7,718 during the first five months of 1974, and a total of 16,863 for the calendar year 1973.

5. Based upon statistics maintained by the California Division of Highways, 1,200 cars pass through the checkpoint during an average hour.

6. At the traffic checkpoint located south of San Clemente, California, we stop approximately 50 vehicles during each hour of operation for limited inspection consisting of inquiring of the occupants of the vehicle as to their citizenship status.

7. The average car is detained for questioning of the occupants approximately three to five minutes.

8. The purpose of the inspection at the checkpoint is to intercept those aliens who have successfully penetrated the border or who have violated the terms of the legal admission by proceeding beyond the 25 mile limitation without documentation. The resulting action by the U. S. Border Patrol is to arrange a voluntary departure of any illegal aliens located in lieu of deportation, in all but a miniscule number of cases. Less than 3% of all aliens apprehended at the checkpoint are prosecuted under the criminal provisions of the immigration laws.

9. The bulk of the action taken is enforcement regarding violations of the 25 mile limitation on holders of temporary border passes, I-186 cards (see 8 C.F.R. § 212.6) and apprehension of those aliens who have entered the United States without inspection in violation of 8 U.S.C. § 1325.

10. Illegal entry of aliens within the Chula Vista sector area of responsibility is increasing at an alarming rate, estimated to be approximately 40,000 entries per month.

11. The major purpose of entry is to secure employment, with 95% of all illegal entrants destined for the Los Angeles area or the central portion of California. All illegal aliens apprehended are interviewed. Through sector apprehension reports it has been determined that the vast majority are in travel to interior points such as Los Angeles, and the San Joaquin Valley of California and further, have been in the United States for a short period of time.

12. Some few of the illegal entrants leave the immediate San Diego area by commercial airline, freight train, or passenger train. The vast majority use motorized vehicles and proceed up Interstate Routes 5 or 395, or State Highway 79. Approximately 70% of all illegal alien travellers traverse Interstate Route 5.

13. The checkpoint at San Clemente is located adjacent to the truck scales maintained by the State of California, with the San Onofre State Park and the Pacific Ocean on the West and Camp Pendleton Marine Corps base to the East. It is 68 miles north of the International Boundary and five miles south of the city limits of San Clemente, California. Circumventing the checkpoint is extremely difficult because of the military patrols at Camp Pendleton and the presence of the State Park rangers between the highway and the ocean.

14. The checkpoint at San Clemente is a permanent structure and is intended to remain in operation 24 hours a day, seven days a week. We are unable to maintain the checkpoint in operation continuously because of safety factors that deteriorate because of inclement weather and traffic in excess of 2,500 cars per hour. We are also unable to maintain the checkpoint because of limitations in manpower available for assignment as well as the basic allocation to that function. The checkpoint is in operation approximately 60% of the time during the year.

15. Smugglers of aliens and those aliens travelling with prior knowledge of the checkpoint customarily wait for the checkpoint to become inactive, for any of the above reasons, before attempting to continue up the highway. This again demonstrates the deterrent effect which the checkpoints have on the traffic in illegal aliens.

16. I have read the opinion of District Court Judge Turrentine in the case of *United States v. Baca,* District Court Number 14656, and to the best of my knowledge the factual findings in regard to the illegal alien problem, the law enforcement problem, and his analysis of the operation of individual traffic checkpoints are correct.

17. A "drop house" is a staging area to keep illegal aliens awaiting inclement weather or, any event that might cause the checkpoint to close down temporarily. Experience has shown when the traffic checkpoint is in operation for

extended periods of time those "drop houses" are utilized by smugglers of aliens. We have found a number of such "houses" located in Oceanside, California, south of the San Clemente checkpoint, which have contained up to 86 aliens at a time.

/s/ Robert D. McCord
ROBERT D. MCCORD

Subscribed to before me and sworn to in my presence on 6-21-74.

/s/ Edward A. Infante
UNITED STATES MAGISTRATE

STATE OF CALIFORNIA }
COUNTY OF SAN DIEGO } ss.

AFFIDAVIT

ROBERT D. McCORD, being first duly sworn, deposes and says:

1. I am Assistant Chief Border Patrol Agent assigned to the Chula Vista sector of the United States Border Patrol.

2. On June 22, 1974, I reviewed the certified reporter's transcript of the sworn testimony of Deputy Chief Border Patrol Agent Richard E. Bathelor (Chula Vista sector) given in the case of *U. S. v. Baca, et. al.*, before the Honorable Howard B. Turrentine, U.S. District Judge, on November 20 and 21, 1973, and to the best of my knowledge his testimony reflects the current state of affairs existing in regard to the enforcement of the immigration laws of the United States in this sector and in the Southwestern part of the United States as a whole.

3. On June 20, 1974, Deputy Chief Border Patrol Bathelor reviewed his testimony in *U.S. v. Baca* and reaffirmed that the testimony was correct to the best of his knowledge.

4. I adopt Agent Batchelor's testimony as a correct statement of the facts as I know them.

/s/ Robert D. McCord
ROBERT D. MCCORD

Subscribed to before me and sworn to in my presence on 6-22-74.

/s/ Edward A. Infante
UNITED STATES MAGISTRATE

STATE OF CALIFORNIA }
COUNTY OF SAN DIEGO } ss.

AFFIDAVIT

RICHARD WISCHKAEMPER, being first duly sworn, deposes and says:

1. I am the Assistant Regional Commissioner, Border Patrol, for the Southwest Region of the U. S. Immigration and Naturalization Service, encompassing the entire Mexican border and as such direct the enforcement operations of the Border Patrol for the Regional Commissioner.

2. During the period July–May of fiscal year 1974, 554,188 deportable aliens have been located by the Border Patrol, in this region alone, of whom 55,515 were located in traffic checking operations.

3. In addition, the great majority of 7,021 smugglers of aliens and 74,708 smuggled aliens were intercepted at such checkpoints.

4. The above figures have increased approximately 30% over fiscal year 1973.

5. Traffic checking operations have contributed significantly to the interception of the illegal aliens destined to the interior of the United States and to the overall impact of Border Patrol enforcement operations aimed at discouraging the illegal entry of aliens.

6. The information contained in *United States v. Baca,* District Court Number 14656, outlines problem areas which will continue to proliferate at an even more rapid rate unless Border Patrol traffic checking operations can be continued.

7. Various estimates have been made as to the total number of deportable aliens presently in the United States ranging from 800,000 to 5,000,000. While such figures must be based on speculation, the mere fact that over 450,000 deportable aliens were located in the southwestern United States in fiscal year 1973, and that figure will increase approximately 30% in fiscal year 1974, supports a reasonable conclusion that over a million deportable aliens are in the country and that that number will increase unless Border Patrol operations can be more effective, including the traffic checking operations.

8. Discontinuation of the above operations would have a significantly adverse affect on the overall control of illegal entry and smuggling of aliens, and add further to the economic, social and health problems outlined in *United States v. Baca, supra.*

/s/ Richard Wischkaemper
RICHARD WISCHKAEMPER

Subscribed to before me and sworn to in my presence on 6-21-74.

/s/ Edward A. Infante
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HON. EDWARD A. INFANTE)

IN THE MATTER OF AN APPLICATION BY THE UNITED STATES OF AMERICA FOR AN INSPECTION WARRANT FOR THE IMMIGRATION AND NATURALIZATION SERVICE TO OPERATE A FIXED TRAFFIC CHECKPOINT ON INTERSTATE ROUTE 5 FIVE MILES SOUTH OF SAN CLEMENTE, CALIFORNIA

No. 399 Misc.

WARRANT OF INSPECTION

TO: Any authorized officer of the Immigration and Naturalization Service including any agent of the U.S. Border Patrol:

Application having been made by the United States for a warrant of inspection for the operation of a fixed checkpoint at San Clemente, California, and having reviewed and considered the affidavits of Robert D. McCord and Richard Wischkaemper, and having reviewed and considered the findings made by the United States District Court in *United States v. Baca*, 368 F.Supp. 398 (S.D. Cal. 1973) and having reviewed and considered a copy of the certified reporter's transcript of the sworn testimony of Deputy Chief Border Patrol Agent Richard E. Batchelor presented in the *Baca* case,

I am satisfied that there is probable cause to believe that mass violations of the Immigration laws of the United States (Title 8, United State Code) have been and are being committed at a point known as the Border Patrol checkpoint on the northbound lanes of Interstate Highway Route 5, approximately five miles south of San Clemente, California.

Wherefore, YOU ARE HEREBY COMMANDED:

(1) to conduct an immigration traffic checkpoint on the northbound lanes of Interstate Route 5, five miles south of San Clemente, California, and;

(2) to stop northbound motor vehicles for the purpose

of making routine inquiries to determine the nationality and/or immigration status of the occupants of said vehicles, and;

(3) to conduct a routine inspection of said vehicles for the presence of aliens, and;

(4) since the flow of alien traffic occurs at all hours of the day, and since limited operation of the traffic checkpoint would tend to defeat its purpose, the operation of this checkpoint may be conducted at any time of day or night, and;

(5) a copy of the warrant shall be displayed in a conspicuous manner at the checkpoint location and upon request, shall be given to any person detained.

(6) The Immigration and Naturalization Service shall file a written return on this warrant containing the following:

A. The approximate number of vehicles passing through the checkpoint during the hours of operation;

B. The approximate number of vehicles stopped for questioning concerning citizenship status;

C. The number of vehicles inspected;

D. The number of vehicles in which aliens were discovered;

E. A recapitulation of the total number of deportable aliens apprehended;

F. An inventory of any property seized.

(7) This warrant shall be returned within ten days of this date, as required by law.

Dated this 22nd day of June, 1974.

/s/ Edward A. Infante
UNITED STATES MAGISTRATE

Return of Warrant Issued June 22, 1974 for the San Clemente Checkpoint

Since 4:00 p.m. on Saturday, June 22 through approximately 11:00 p.m. on Sunday, June 30, 1974, the activity at the traffic checkpoint operated by the Border Patrol, south of San Clemente, California, has been as follows:

A. The checkpoint was operated for a total of 124 hours and 10 minutes during which 145,960 vehicles passed through the checkpoint;

B. 820 vehicles were stopped at the checkpoint for questioning;

C. 202 vehicles were inspected;

D. Aliens were found in 171 vehicles;

E. 725 deportable aliens were apprehended in the vehicle stopped at this checkpoint;

F. No property was seized.

I swear that the above information is a true and detailed account of the operation of the Border Patrol Checkpoint south of San Clemente, California.

/s/ Gene E. Harris

Subscribed and sworn to and returned before me this 1st day of July, 1974.

/s/ Edward A. Infante
UNITED STATES MAGISTRATE

STATE OF CALIFORNIA }
COUNTY OF SAN DIEGO } ss.

AFFIDAVIT

GENE E. HARRIS, being first duly sworn, deposes and says:

1. I am the Patrol Agent in Charge at the San Clemente Border Patrol traffic check facility. I have been employed with the Border Patrol in the southwest for 23 years. I am responsible for the operations engaged in by 33 agents.

2. From 4:00 p.m. on Saturday, June 22 through approximately 11:00 p.m. on Sunday, June 30, 1974, an estimated 145,960 vehicles passed through the San Clemente traffic checkpoint during the 124 hours and ten minutes of operation during this period. We had 820 vehicles referred to secondary at the traffic checkpoint for questioning regarding nationality and/or citizenship. We inspected 202 vehicles. We found deportable aliens in 171 vehicles. In 169 of these vehicles aliens were in plain view to the officers in secondary. In 33 cases the agents at secondary inspected portions of the vehicles in which concealed aliens could be secreted. In all 33 instances we had the permission and consent of the driver. Of these 33 vehicles inspected deportable aliens were found in two instances. Therefore deportable aliens were found in 171 vehicles referred to secondary with the total number of deportable aliens apprehended during the 124 hours and ten minutes of operation amounting to 725. See Exhibit A.

3. In two instances vehicles referred to secondary by the officers accelerated from the checkpoint necessitating a high speed chase to overtake the driver. One case proceeded for 15 miles before being successfully stopped by the California Highway Patrol. This car contained an illegal alien driver and four other illegal aliens. The second case terminated in a wreck at the Magdelena off-ramp and I-5 at San Clemente. The driver, an illegal alien, was injured and required hospitalization, and seven illegal aliens were removed from this vehicle.

4. During this time period an additional 172 illegal aliens were received from other law enforcement agencies. These aliens were apprehended as a result of the checkpoint being

in operation and the aliens attempting to evade the checkpoint by walking around and were observed and arrested in the state park area adjacent to the checkpoint upon arrival in the San Clemente city limits or by the California Highway Patrol observing them getting out of vehicles south of the checkpoint or by the military police encountering aliens walking around the marine base to avoid the checkpoint.

/s/ Gene E. Harris
GENE E. HARRIS

Subscribed to before me and sworn to in my presence on July 1, 1974.

/s/ Edward A. Infante
UNITED STATES MAGISTRATE

1974 Date	A	B	C	D	E	Shift & No. Hrs. Open
6/22	9840	120	17	17	45	4P–10P (6 hrs.)
6/23	7500	26	6	1	1	10A–1P (3 hrs.)
6/24	1200	45	10	9	36	2A–8A (6 hrs.)
"	11,000	14	9	4	7	8A–4P (8 hrs.)
"	7400	95	8	8	27	5:30P–11:45P (6 hrs.)
6/25	1100	40	16	16	85	2A–6A (4 hrs.)
"	11,300	31	9	6	34	8A–4P (8 hrs.)
"	7100	38	9	9	13	6P–Mid (6 hrs.)
6/26	1700	30	7	2	27	3A–8A (5 hrs.)
"	9500	20	5	4	7	10A–3P (5 hrs.)
"	7300	43	8	8	21	4:30P–11:45P (7 hrs.)
6/27	1800	45	22	20	125	12:30A–7:30A (7 hrs.)
"	9000	25	8	9	60	10A–2P (4 hrs.)
"	5600	15	5	6	41	6P–Mid (6 hrs.)
6/28	4680	60	7	4	18	Mid–8A (8 hrs.)
"	11,420	28	9	9	35	10A–3P (5 hrs.)
"	6000	15	2	0	0	7P–11P (4 hrs.)
6/29	1245	13	8	8	34	2A–7A (5 hrs.)
"	12,000	36	9	5	15	9A–3P (6 hrs.)
"	6800	26	3	3	16	7P–11P (4 hrs.)
6/30	1200	16	15	15	56	1A–6A (5 hrs.)
"	9375	34	10	8	21	9A–2:30P (5½ hrs.)
"	1900	5	0	0	0	10P–10:40P (40 mins.)
	145,960	820	202	171	725	124 hours 10 minutes

A*—Number of vehicles passing through checkpoint
B*—Number of vehicles stopped for questioning
C—Number of vehicles inspected
D—Number of vehicles in which aliens discovered
E—Number of deportable aliens apprehended

*Approximate number

STATE OF CALIFORNIA }
COUNTY OF SAN DIEGO } ss.

AFFIDAVIT

ROBERT D. McCORD, being first duly sworn, deposes and says:

1. I have reviewed the affidavits that I executed on June 21 and 22, 1974, and I believe that the information contained in these affidavits still reflect the actual state of affairs that exist in enforcement of the Immigration laws in the Southern District of California and in the southwestern United States as a whole.

2. Since approximately 4:30 p.m. on Saturday, June 22, 1974, through approximately 8:00 a.m. on Friday, June 28, 1974, the activity at the traffic checkpoint operated by the Border Patrol south of San Clemente, California, has been as follows:

A. The checkpoint was operated for a total of 89 hours;

B. During this period an estimated 96,020 vehicles passed through the checkpoint during these hours of operation;

C. 647 motor vehicles were stopped at the checkpoint;

D. 146 vehicles were inspected;

E. Aliens were found in 123 vehicles;

F. 548 deportable aliens were apprehended in the vehicles stopped at this checkpoint.

/s/ Robert D. McCord
ROBERT D. McCORD

Subscribed to before me and sworn to in my presence on 6-28-74.

/s/ Edward A. Infante
UNITED STATES MAGISTRATE

SUPREME COURT OF THE UNITED STATES

No. 74-1560

United States,
Petitioner,

v.

Amado Martinez-Fuerte et al.

ORDER ALLOWING CERTIORARI. Filed October 6, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U.S. Government Printing Office: 1975—596-967/111

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. _____

74-1560

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

AMADO MARTINEZ-FUERTE, ET. AL.,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

On 18 June 1975, a Petition for Writ of Certiorari in the above-entitled case was served on counsel for Respondents. Respondents adopt the material set forth in the petition under the headings "Jurisdiction," "Constitutional Provision Involved," and "Statement of Facts." By a separate motion to strike, Respondents move this Court to strike portions of the Solicitor General's petition for certiorari which contains affidavits and statistics dehors the record and put forward by Border Patrol officers. These materials were never part of the record of any of the cases before this Court.

QUESTION PRESENTED

1. Whether in the absence of probable cause, reasonable suspicion, or a judicially authorized warrant based upon those concepts, Border Patrol officers may lawfully stop any vehicle they choose and interrogate its occupants on Interstate 5, located 66 miles north of the Mexican-American border, and between California's two largest cities, San Diego and Los Angeles?

Once again, the Government seeks to legalize the activities of the Border Patrol at the San Clemente checkpoint located "on the principle highway between San Diego and Los Angeles, and [where] over 10 million vehicles pass. . . in a year." United States v. Martinez-Fuerte, 514 F. 2d 308, 312 (9th Cir. 1975), petition for rehearing en banc denied 17 April 1975. In United States v. Ortiz, 422 U.S. ___ (30 June 1975), this Court recently held that under the Fourth Amendment as interpreted in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), the Border Patrol may not, in the absence of consent or probable cause, search private vehicles at traffic checkpoints removed from the border or its functional equivalent. For the purposes of a search, the Court stated in Ortiz that there was no difference between a roving stop and search and such activity performed at a checkpoint.

This Court in Ortiz was "not persuaded that the checkpoint [at San Clemente] limits to any meaningful extent the officer's discretion to select cars for search. . . . It is apparent from these [checkpoint search] figures that checkpoint officers exercise a substantial degree of discretion in deciding which cars to search." (Slip opinion at 5)

In United States v. Brignoni-Ponce, 422 U.S. ___ (30 June 1975), this Court held that the Fourth Amendment does not allow a roving patrol of the Border Patrol to stop a vehicle near the area of the San Clemente checkpoint for the purpose of questioning its occupants about their citizenship and immigration status without a reasonable suspicion based upon specific articulable facts that the vehicle contains aliens illegally in the country. In Brignoni-Ponce, the only articulated basis for the roving stop of the car was that the occupants of the vehicle appeared to be of Mexican ancestry. This was held not to be sufficient to justify a stop based upon the reasonable suspicion rationale.

Recognizing that the border area involves millions of motorists who violate no laws, this Court in Brignoni-Ponce refused to grant the Government the extravagant license to stop for questioning any motorist within 100 miles of the border:

> "In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. Roads near the border carrying not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.4 million, is located on the border. Texas has two fairly large metropolitan areas directly on the border: El Paso, with a population of 360,000, and the Brownsville-McAllen area, with a combined population of 320,000. We are confident that substantially all of the traffic in these cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens. To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers." (Slip opinion at 9)

Brignoni-Ponce effectively limits the exercise of authority by the Border Patrol granted by §§ 287(a)(1) and (3) of the Immigration and Nationality Act, 8 U.S.C. § 1357(a)(1) and (3) (1970). The Court read into the statute the constitutional standards of reasonable suspicion previously articulated in Terry v. Ohio, 392 U.S. 1 (1968), for street detentions of pedestrians. For purposes of the instant case, it is important to note the Court's concern with the wide degree of arbitrary discretion exercised by the Border Patrol in treating persons differently at checkpoints (Ortiz at 5), and its concern with the potential for harrassment of millions of lawful motorists who are in no way involved in illegal alien activity in the border region (Brignoni-Ponce at 9).

Mr. Justice White's opinion concurring in the judgment in Ortiz and Brignoni-Ponce questioned the lawfulness of selective, causeless checkpoint stops while noting the high costs and low benefits of the Border Patrol efforts to stem the heavy flow of illegal aliens entering this country.

> "The entire system, however, has been notably unsuccessful in deterring or stemming this heavy flow; and its costs, including added burdens on the courts, have been substantial. Perhaps the judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness as long as it is lawful for business firms and others to employ aliens who are illegally in the country. This problem, which ordinary law enforcement has not been able to solve, essentially poses questions of national policy and is chiefly the business of Congress in the Executive Branch rather than the Courts."

The Decision in Martinez-Fuerte

In the instant case, a United States Magistrate on 22 June 1974 issued a "warrant of inspection" which "commanded" the Border Patrol to operate the immigration traffic checkpoint at San Clemente and stop all northbound vehicles for the purpose of making "routine inquiries" to determine the immigration status of the occupants. The respondents were stopped and interrogated at the San Clemente checkpoint pursuant to the "warrant of inspection." The Government concedes that there was neither probable cause nor founded suspicion for the stop, seizure

and interrogations that took place. The Government relies solely upon the inspection warrant to justify these stops and interrogations.

The Ninth Circuit opinion below noted that over ten and one-half million cars pass through the checkpoint each year. "The overwhelming majority of persons travelling north through the checkpoint are lawfully within the country; indeed, most of them are not aliens and have not crossed the border at all." Martinez-Fuerte, supra at 312.

Of import in the analysis of the constitutionality of the stop and interrogation procedure at the checkpoint, especially in light of this Court's language in Ortiz and Brignoni, the opinion of the Ninth Circuit demonstrates the wide degree of discretion exercised by officers at the checkpoint in selecting individuals for the interrogation procedure off the highway:

> "The officer at the "point" (between lanes of traffic) surveys the oncoming cars, looking for those which in the border patrol parlance "break the pattern" of the traffic. . . . The agent at the "point" makes a purely discretionary decision whether to wave each auto through the checkpoint after it has slowed or come to a "fleeting stop." Id. If for some reason a vehicle arouses the officer's suspicion, he will divert it to a secondary inspection area where the travellers will be detained for inquiry by other agents into their citizenship and immigration status. [Citations omitted]." Martinez-Fuerte, supra at 313.

Just as this Court noted in Ortiz that the checkpoint did not limit to any meaningful extent the officer's discretion to select cars for search, the Ninth Circuit noted that there was similarly no meaningful limit on the discretion of the "point" officer to select certain cars to be routed off the interstate highway for interrogation by awaiting Border Patrol officers. This unbridled discretion is reflected in the affidavits

and return on the warrant issued below where 145,960 number of cars were subjected to the initial "fleeting stop" and 820 were referred off the road for interrogation of the occupants. In this context, the language of this Court in Ortiz is particularly apt in considering this stop and interrogation procedure:

> "It is apparent from these figures that checkpoint officers exercise a substantial degree of discretion in deciding which cars to search [or stop and interrogate]. The Government maintains that they voluntarily exercise that discretion with restraint and search only vehicles that arouse their suspicion, and it insists that officers should be free of judicial oversight of any kind. Viewed realistically, this position would authorize the Border Patrol to search [or stop, refer off the highway, and interrogate a vehicle's occupants] at random, for no officer would ever have to justify his decision to search [or stop, refer off the highway, and interrogate occupants of] a particular car.
>
> This degree of discretion to search [or stop and refer off the highway] private automobiles is not consistent with the Fourth Amendment." (Ortiz at 5)

As the Ninth Circuit opinion noted, during the period of warrant authorization in the case at bar, an estimated 145,960 vehicles passed through the San Clemente checkpoint and were subjected to the "fleeting stop." A point officer scanned each vehicle for a determination whether or not to refer the vehicle to secondary. Of this total, 820 vehicles were referred to secondary for interrogation regarding nationality and citizenship and only 171 cars were found to contain illegal aliens. "These border patrol statistics reveal that of the 145,960 vehicles passing through the checkpoint, only 171, or 0.12%, were found to contain deportable aliens." Martinez-Fuerte, supra at 314.

Thus, not only is there total unbridled discretion for the point officer to select individuals for referral off the highway and interrogation, but no articulated standard is required for such a selection process. While all of the traffic going through the checkpoint is forced to stop from highway speeds of 55 miles per hour, 1% is further referred to the secondary area where it is subjected to the more intrusive removal from the highway and interrogation. It is also interesting to note that although the Government makes broad claims that the "point" officer is skilled in selecting appropriate vehicles for the secondary examination, the return on the warrant in this case reflects that "the border patrol was 'overzealous' by a factor of nearly five in diverting cars for secondary inspection. Of 820 cars diverted, 649 had no 'illegals' aliens in them." Martinez-Fuerte, supra at 314.

The Ninth Circuit has held that to support a stop at a traffic checkpoint, the officers must have a "founded suspicion" that the occupants in the vehicle may be in the United States illegally. United States v. Juarez-Rodriguez, 498 F.2d 7 (9th Cir. 1974). The issue in Martinez-Fuerte before the Court below was whether the "warrant of inspection" somehow transformed otherwise unreasonable stops and seizures into constitutional ones. Id. at 315. Relying upon this Court's decisions in Almeida-Sanchez, supra, and Carroll v. United States, 267 U.S. 132 (1925), the Ninth Circuit held that federal agents cannot constitutionally stop automobiles systematically or randomly on the mere chance of discovering something illegal. Id.

Tracing the purpose and history of the probable cause and warrant clauses of the Fourth Amendment, the Ninth Circuit noted that search warrants are not a substitute for the requirement of probable cause. A warrant is to provide a second level of protection in addition to probable cause. See United States v. United States District Court, 407 U.S. 297, 316 (1972). The Ninth Circuit found that the "warrant of inspection" in this case failed to provide either level of protection, for there was

neither probable cause, reasonable suspicion to believe the vehicles in these cases were involved in illegal activity, nor did the warrant interpose the independent judgment of the magistrate. In fact, no reason was put forward below why any of the respondents were subjected to the selective treatment at the checkpoint. The warrant acted as a carte blanche authorization for Border Patrol officers to stop any and all cars and detain them for interrogation of the occupants at the whim of the officers. This warrant is nothing more than the rubber stamp warrant condemned in Aguilar v. Texas, 378 U.S. 108, 111 (1964).

Whatever the utility or constitutionality of inspection warrants as outlined in Justice Powell's concurring opinion in Almeida-Sanchez, the warrant in this case in no way met Justice Powell's standards set forth at 413 U.S. 283-284 of Almeida-Sanchez. When these standards are measured by the facts of this case, the patent unconstitutionality of this "warrant" is made plain:

1) The frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area. Id. at 283. As the court below found, "the frequency with which illegal aliens pass through the San Clemente checkpoint is far too low to make the operation of a checkpoint reasonable. During the effective period of the warrant of inspection, only 0.12% of the passing cars were found to contain "illegal" aliens. Other considerations aside, that minuscule fraction alone would render the checkpoint operation unreasonable." Martinez-Fuerte, supra at 321.

2) The proximity of the area in question to the border. Almeida-Sanchez at 284. The Ninth Circuit found that "the San Clemente checkpoint is 66 miles from the border. Surely, Justice Powell envisioned roving patrols much nearer the border. In any event, we think 66 miles is too far away, particularly where the checkpoint is located on an interstate highway which is the major traffic artery between the two largest cities in California, an artery that carries many million cars each year." Martinez-Fuerte, supra at 321.

3) The extensiveness and geographic characteristics of the area, including the roads therein and the extent of their use. Almeida-Sanchez, supra at 284. The Ninth Circuit opinion below considered the geographic characteristics relevant in determining whether there was an essential nexus with the border. In this case, the Ninth Circuit found there was no such nexus especially in light of Justice Powell's concern for the "vast areas of uninhabited desert and arid land which are traversed by few, if any, main roads or highways, but which nevertheless may afford opportunities--by virtue of their isolated character--for the smuggling of aliens." Almeida-Sanchez, supra at 284 n. 4.

4) The probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area. Id. In Martinez-Fuerte, the court below found "the probable, indeed actual, degree of interference with the rights of innocent persons at the checkpoint is intolerable. Roughly 999 of every 1,000 cars passing the checkpoint carry only persons who are lawfully within the country and under Carroll, supra, 'entitled to use the public highways [and] have a right to free passage without interruption.' . . . We cannot countenance the cumulative intrusion of stopping 10 million cars per year where only one out of every 1,000 passing cars may contain aliens illegally within the country." Martinez-Fuerte, supra at 322.

CONCLUSION

As this nation approaches its bicentennial celebration of independence, it is ironic that the Government presents the Supreme Court of the United States with a certiorari petition requesting the constitutionalization of a general warrant procedure which grants Border Patrol agents unbridled discretion to stop over 10 million motorists a year on an interstate freeway to select certain targets for subsequent removal from the freeway and interrogation. In Boyd v. United States,

116 U.S. 616 (1886) this Court reviewed the history of the general warrant and its impact on events leading up to the adoption of the Fourth Amendment. The "warrant of inspection," found unconstitutional below, is directly analogous to the general warrants and writs of assistance made illegal by the Fourth Amendment.

If there is to be a use for the warrant system envisioned by Justice Powell, then the supporting concept of the functional equivalent of probable cause or reasonable suspicion must be both functional and equivalent. Here, the Government argues that the San Clemente checkpoint offers an equivalency to the probable cause concept. Yet, the return on this warrant established that only one out of every 1,000 cars passing through the checkpoint possibly contained illegal aliens. This is not an area-wide equivalent of probable cause; it is a new concept which would be more accurately termed "remotely possible cause." Charles Gordon, General Counsel for the Immigration and Naturalization Service, suggested the obvious location for an area warrant--"a backroad near the border." Hearings Before the Subcommittee on Immigration, Citizenship, and International Law of the Committee on the Judiciary of the House of Representatives, 93d Cong. 1st Sess., 22 (1973). It is near the border where the border patrol's enforcement mandate is strongest and where the concept of "functional equivalency" may have its place. San Clemente, California, directly north of nineteen Southern California cities is not the proper place for such activity.

In Ortiz and Brignoni-Ponce, several Justices of this Court noted that the law enforcement problem in this area is made almost impossible because of the void of legislation making it illegal to hire illegal immigrants. A Ninth Circuit jurist noted this ironic state of affairs over 21 years ago: ". . . employment of . . . aliens is primarily responsible for the whole Mexican alien problem." Herrera v. United States, 208 F.2d 215, 218 (9th Cir. 1953) (Pope concurring).

If there is to be any meaningful solution to the problem, it rests with Congress and the Executive to eliminate the irresistible magnet of employment for the Mexican national. However, if the special interests in the United States, which benefit from exploitation of illegal aliens, succeed in preventing passage of needed legislation, this Court should not be asked to dismantle the Fourth Amendment to create for law enforcement carte blanche powers through area inspection warrants in order to ferret out illegal aliens within the borders of the United States. The warrant of inspection issued below contravenes all of this Court's Fourth Amendment teachings. As Justice Stewart stated in Sanford v. Texas, 379 U.S. 476, 486 (1965):

> "The indiscriminate sweep of that language [in the warrant] is constitutionally intolerable. To hold otherwise would be false to the terms of the Fourth Amendment, false to its meaning, and false to its history."

It is therefore respectfully submitted that the Government's petition for a writ of certiorari should be denied.

Respectfully submitted,

DATED: 8 July 1975

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Supreme Court, U. S.
FILED
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No. 74-1560

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

AMADO MARTINEZ-FUERTE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1560

UNITED STATES OF AMERICA, PETITIONER

v.

AMADO MARTINEZ-FUERTE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 514 F. 2d 308.

JURISDICTION

The judgment of the court of appeals (Pet. App. 44a-45a) was entered on March 5, 1975. A timely petition for rehearing and suggestion for rehearing *en banc* were denied on April 17, 1975 (Pet. App. 46a-47a). On May 12, 1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including June 16, 1975. The petition was filed on June 11, 1975, and was granted on October 6, 1975

(A. 59). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Border Patrol officers, acting pursuant to a judicial warrant issued upon a showing of area-type probable cause, may lawfully stop northbound vehicles at a fixed immigration traffic checkpoint in the Mexican border area in order to make routine inquiries concerning the nationality and immigration status of the occupants of the vehicles.

2. Whether the judicial warrant in this case, assuming that a warrant was necessary to justify the stops, was issued upon an adequate showing of area-type probable cause.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

This case involves three separate prosecutions in the United States District Court for the Southern District of California for offenses relating to the transportation of aliens who were present in this

country unlawfully. In each case, the vehicle in which the respondent was traveling was stopped by Border Patrol officers at the permanent immigration traffic checkpoint on Interstate Route 5 near San Clemente, California, and the officers' inquiries concerning the nationality and immigration status of the vehicle's occupants led to the discovery of one or more illegal aliens.

In each case, the checkpoint operations were conducted pursuant to a "warrant of inspection" issued by a United States magistrate on June 22, 1974 (A. 52–53). The government's application for the warrant (A. 44) was supported by the affidavits of Robert D. McCord, Assistant Chief Patrol Agent assigned to the Chula Vista Sector of the United States Border Patrol (A. 45–48, 49), and Richard Wischkaemper, Assistant Regional Commissioner, Border Patrol, for the Southwest Region of the United States Immigration and Naturalization Service (A. 50–51), as well as the evidence presented during a consolidated hearing in the United States District Court for the Southern District of California before Judge Howard B. Turrentine on November 19, 20, and 21, 1973, and the court's findings of fact in those cases. See *United States* v. *Baca*, 368 F. Supp. 398 (S.D. Cal.).[1]

[1] The district court issued an *en banc* general order in October 1973, providing for a limited consolidation of the large number of criminal cases then pending before it involving "constitutional questions left open" by this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (368 F. Supp. at 401). After several days of hearing, Judge Turrentine issued a com-

The magistrate reviewed and considered the McCord and Wischkaemper affidavits, the district court's findings in *Baca,* and portions of the transcript of the consolidated hearing in *Baca* (A. 52). He concluded that "there is probable cause to believe that mass violations of the Immigration laws of the United States * * * have been and are being committed" at the location of the San Clemente checkpoint (*ibid.*). He accordingly issued a warrant empowering authorized officers of the Immigration and Naturalization Service "to conduct an immigration traffic checkpoint on the northbound lanes of Interstate Route 5, five miles south of San Clemente, California, * * * to stop northbound motor vehicles for the purpose of making routine inquiries to determine the nationality and/or immigration status of the occupants of said vehicles, and * * * to conduct a routine inspection of said

prehensive opinion containing detailed findings on the causes and consequences of the widespread illegal entry of aliens from Mexico, the difficult law enforcement problems confronting the Border Patrol in its efforts to maintain an effective deterrent and to apprehend illegal entrants, the role of the Border Patrol's fixed immigration checkpoints in the overall law enforcement program, and the placement and operating characteristics of each of the checkpoints in the Southern District of California. A copy of the transcript in the *Baca* hearing was lodged with the district court in Crim. No. 74–1350 (*Martinez-Fuerte*), and an order was subsequently entered making that transcript a part of the record in *Martinez-Fuerte* (A. 2). In addition, the three cases here were consolidated by the court of appeals, and the record on appeal in each case was supplemented with the entire transcript of the *Baca* proceedings (Pet. App. 9a).

We are lodging a copy of that three-volume transcript with the Clerk of this Court. Citations to "*Baca* Tr." refer to that transcript.

vehicles for the presence of aliens" (A. 52–53). The warrant authorized operation of the checkpoint at any time of the day or night "since the flow of alien traffic occurs at all hours of the day, and since limited operation of the traffic checkpoint would tend to defeat its purpose" (A. 53).[2]

1. (a) At approximately 8:00 p.m. on June 24, 1974, Border Patrol officers at the San Clemente checkpoint stopped a vehicle driven by respondent Martinez-Fuerte and containing two female passengers. The vehicle was directed to the secondary inspection area, where an officer questioned the occupants concerning their right to be in the United States. Martinez-Fuerte produced documentation showing that he was a lawful resident alien, but his two female passengers admitted that they were citizens of Mexico who were present in this country unlawfully. (Pet. App. 3a; A. 40–41.)

The district court denied Martinez-Fuerte's motion to suppress (A. 28). The evidence at his subsequent jury trial, including the testimony of the two aliens who were found in the vehicle and the Border Patrol agent who found them, showed that the aliens crossed the border illegally on foot and took a bus from San Ysidro to San Diego, where they met Martinez-Fuerte at the San Diego bus terminal. They were bound for Los Angeles when the vehicle in which they were rid-

[2] The warrant also directed the Immigration and Naturalization Service to file within 10 days a written return on the warrant giving detailed statistics on the operation of the checkpoint during that period (A. 53). The return on the warrant appears at A. 54.

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ing was stopped at the San Clemente checkpoint (Tr. 21–28, 42–49).

Martinez-Fuerte was convicted on two counts of transporting aliens present in this country unlawfully, in violation of 8 U.S.C. 1324(a)(2).[3] He was sentenced to concurrent terms of three years' imprisonment. The court directed, however, that respondent be confined in a jail-type or treatment institution for six months, that execution of the remainder of the sentence be suspended, and that respondent be placed on probation for a period of five years (A. 42). He appealed from the judgment of conviction.

(b) Also on June 24, 1974, Border Patrol officers at the San Clemente checkpoint stopped a car driven by respondent Jiminez-Garcia and containing one passenger. Questioning by the officers revealed that the passenger was present in the United States illegally. (Pet. App. 3a–4a; A. 19.)

Jiminez-Garcia was charged in a two-count indictment with transporting an alien present in this country unlawfully, in violation of 8 U.S.C. 1324(a)(2), and with conspiring to commit that offense, in violation of 18 U.S.C. 371 (A. 11–13). The parties stipulated that the alien would testify that he made arrangements with an unknown person in Tijuana, Mexico, to be smuggled into the United States and transported to Los Angeles, that he was guided across

[3] In addition to the two counts on which he was convicted (counts 2 and 3), respondent was also charged with two counts of inducing the illegal entry of the aliens (counts 4 and 5) and one count of conspiring to transport, conceal, and induce the illegal entry of the aliens (count 1) (A. 7–10). Those counts were dismissed pursuant to the government's motion (A. 2, 29–30).

the border to a residence in San Ysidro, California, and that he was subsequently picked up by Jiminez-Garcia and transported to his point of apprehension at the San Clemente checkpoint (A. 19).

The district court granted respondent's motion to suppress the evidence derived from the stop of his vehicle (A. 34), and the government appealed pursuant to 18 U.S.C. 3731.

(c) On June 28, 1974, Border Patrol officers at the San Clemente checkpoint stopped a car driven by respondent Guillen, in which respondent Medrano-Barragan and his wife were passengers. The officers discovered, upon questioning the occupants, that Medrano-Barragan and his wife were illegally in the country. The officers then searched the car and found three other illegal aliens in the trunk. (Pet. App. 4a.)

Guillen and Medrano-Barragan were jointly indicted on four counts of transporting aliens illegally in this country, four counts of inducing the illegal entry of aliens, and one count of conspiring to commit those offenses, in violation of 8 U.S.C. 1324(a)(2) and (a)(4) and 18 U.S.C. 371 (A. 14–18). The parties stipulated that the four aliens other than Medrano-Barragan would testify that Medrano-Barragan led them across the border from Mexico clandestinely and that they thereafter entered Guillen's car for the drive north (A. 21–24).

The distict court granted respondents' motions to suppress the evidence derived from the stop of Guillen's car (A. 37–38), and the government appealed pursuant to 18 U.S.C. 3731.

(d) The government does not contend that the Border Patrol officers who stopped respondents' vehicles in each case had traditional probable cause or reasonable suspicion, in the sense of specific knowledge about the particular vehicle stopped, that led them to believe that the vehicles contained aliens who were illegally in the country.

2. The three cases were consolidated for argument and decision by the court of appeals. At the time the cases were briefed and argued, the court of appeals had already held that stops of vehicles at immigration checkpoints, for the purpose of asking the occupants about their right to be in this country, were unlawful in the absence of a warrant, unless the officer had "a reasonable belief, founded upon 'articulable' facts, that one or more of the people to be interrogated are aliens illegally in the country." *United States* v. *Esquer-Rivera,* 500 F. 2d 313, 314 (C.A. 9). See also *United States* v. *Juarez-Rodriguez,* 498 F. 2d 7 (C.A. 9). The government's brief in the court of appeals in *Martinez-Fuerte* nevertheless preserved the point, arguing that "the traffic checkpoints can be operated under the statute with or without prior judicial approval by way of a warrant" (pp. 24–25). The court of appeals rejected the contention on the authority of its prior decisions (Pet. App. 15a–16a) and framed the principal question before it as "whether the warrant of inspection somehow transforms otherwise unreasonable seizures into constitutional ones" (*id.* at 16a).

The court ruled, with one judge dissenting, that "the warrant is invalid and that the checkpoint operations

which it purports to authorize violate the Fourth Amendment of the Constitution" (*id.* at 2a). The majority held that the warrant was defective because it "is not based on any probable cause or even founded suspicion focussed on any particular individual or vehicle" (*id.* at 19a).

The court rejected as "unsatisfactory" (*id.* at 24a) the area warrant procedure suggested by Mr. Justice Powell's concurring opinion in *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 275–285. The court stated (Pet. App. 24a):

> We cannot accept the notion that an area warrant can constitutionally authorize immigration checkpoint operations in the interior of the United States because we think that the analogy to the administrative inspection cases is inapt and because we think that the concept of an area warrant, under these circumstances, is contrary to certain fundamental precepts of the Fourth Amendment, as revealed by its antecedent history.

The majority also stated that "the San Clemente checkpoint does not meet the standards sketched by Justice Powell in his concurrence in *Almeida*" (*id.* at 33a), because the percentage of automobiles passing through the San Clemente checkpoint that contain illegal aliens is too small, the checkpoint is too far from the Mexican border and lacks "an essential nexus with the border" (*id.* at 34a), and the interference with the traveling public is too great.

Judge Carter dissented. He noted (*id.* at 37a) that the four dissenting Justices in *Almeida-Sanchez,* while disagreeing with Mr. Justice Powell concerning the

need for an area warrant, expressly agreed that "such a warrant so issued would satisfy the Fourth Amendment" (413 U.S. at 288). Emphasizing that the cases involved only stops for interrogation and not random searches of automobiles, Judge Carter concluded that the warrant for the San Clemente checkpoint was valid and that the stopping of respondents' vehicles was reasonable under the Fourth Amendment.

In light of the majority's conclusion that the "checkpoint operations under the warrant of inspection [were] constitutionally unreasonable" and that "evidence obtained as a result of the traffic check in each case should have been suppressed" (Pet. App. 35a), the court reversed the conviction of Martinez-Fuerte and affirmed the district court's orders suppressing the evidence in the other cases.[4]

SUMMARY OF ARGUMENT

I

A. The constitutional validity of the Border Patrol's checkpoint stop and inquiry procedure must be tested under "the reasonableness requirement of the Fourth Amendment" (*United States* v. *Brignoni-Ponce,* No. 74–114, decided June 30, 1975, slip op. 8–9), and the reasonableness of the operation "depends on a balance between the public interest and the

[4] The court denied the government's petition for rehearing and rejected a suggestion for rehearing *en banc* (Pet. App. 46a–47a). It stayed its mandate, however, pending this Court's decisions in *United States* v. *Ortiz*, No. 73–2050, and *Bowen* v. *United States*, No. 73–6848, decided June 30, 1975. The petition for a writ of certiorari was filed prior to the date of those decisions.

individual's right to personal security free from arbitrary interference by law officers" (*id.* at 5). The Court's view of that balance in *Brignoni-Ponce* led it to conclude that officers on roving patrol may stop vehicles to inquire about the occupants' citizenship and immigration status "only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country" (slip op. 11).

That limitation on roving patrol stops should not be applied to checkpoint stops, because the differences between roving patrol and checkpoint operations significantly affect both sides of the reasonableness balance. The law enforcement need to conduct routine stops and inquiries at checkpoints is substantially greater, and the intrusions upon protected Fourth Amendment interests are substantially reduced.

Although roving patrols have been an important part of the Border Patrol's traffic checking program, they have always been viewed as essentially supplementary to the checkpoints, which (together with the line watch) are the heart of the enforcement effort. Stops and inquiries at checkpoints have been the single most important traffic checking operation, in terms both of apprehending deportable aliens and of deterring unlawful entry. Experience has shown that most illegal transportation of aliens occurs on the major roads leading north from the Mexican border—the roads on which the traffic checkpoints are located—and that a stop and brief inquiry frequently reveals

the presence of illegal entrants in the passenger compartment of the vehicle or leads to probable cause warranting a search of the vehicle's interior.

Except in rare cases, however, the checkpoint officer is not in a position to observe an approaching vehicle for a long enough time to determine, *before* the stop and inquiry, whether there is reason to believe that the vehicle contains illegal entrants. Unlike a roving patrol officer, whose mobility allows him an extended opportunity to observe a vehicle for suspicious signs, the checkpoint officer is stationary and has only a fleeting opportunity to decide whether a stop and inquiry is warranted. Although many checkpoint stops are in fact made on the basis of articulable factors, those factors might not, in many cases, amount to a "reasonable suspicion" of illegal activity. Moreover, in order for a checkpoint to pose a meaningful risk of detection for even the most carefully disguised professional smuggling operations, some stops must be made on an essentially random basis. Unlike the situation in *Brignoni-Ponce,* therefore, a reasonable suspicion requirement for checkpoint stops would not allow "the Government adequate means of guarding the public interest" (slip op. 10).

Moreover, a checkpoint stop and inquiry is significantly less intrusive than a similar procedure on roving patrol. The motorist is not pursued by a patrol car with siren and flashing lights. A stop at a checkpoint involves little more of an interruption in travel than that caused by a traffic light or a stop sign.

Also significant is the fact that an officer at a checkpoint has no "discretion to search private automobiles," as in *United States* v. *Ortiz,* No. 73–2050, decided June 30, 1975, slip op. 5. Nor does he have discretion to "stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road," as in *Brignoni-Ponce* (slip op. 9). A checkpoint officer has no roving mandate to stop cars anywhere in the border area. His responsibilities are limited to a fixed location, strategically selected by high-level Border Patrol officials to maximize its deterrent impact while minimizing the interference with lawful traffic.

B. Although the stop and inquiry procedure here was authorized in advance by a federal magistrate—a fact, as we argue below, that contributes to the reasonableness of the operation—we think the procedure was reasonable regardless of the warrant. Advance judicial approval is unnecessary to assure the reasonableness of the practice because the brief stop and relatively innocuous verbal exchange do not "invade * * * a right to privacy which the interposition of a warrant requirement is meant to protect" (*Cardwell* v. *Lewis,* 417 U.S. 583, 589 (plurality opinion)), and because the fixed location and consistent operation of a checkpoint minimizes the need for repeated *ex parte* judicial approval in *advance* of its operation during a particular week or month.

Moreover, a warrant requirement could frustrate the legitimate law enforcement objectives served by checkpoints. The deterrent effectiveness of each of the Border Patrol's 47 checkpoints in the Mexican border area depends largely on the coordinated oper-

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ation of the entire network. For a judicial officer to review in advance the basic agency decision to operate a particular checkpoint would require consideration of information relating to coordinate checkpoints as well, often including checkpoints located in other judicial districts. Denial of a warrant for one checkpoint could seriously disrupt the coordination and reduce the deterrent effectiveness of the entire system, and appellate review may be unavailable.

Moreover, the need to operate some less frequently used checkpoints may arise unexpectedly because of unanticipated information, weather or manpower conditions, or strategic considerations. An application for a checkpoint warrant, however, may take too long. The result of a warrant requirement in such circumstances may be to confine the Border Patrol's enforcement efforts to those checkpoints that are operated regularly and thereby to diminish materially the deterrent effectiveness of traffic checking operations as a whole.

II

A. If any doubt remains concerning the reasonableness of the stop and inquiry procedure followed here, the warrant—issued by a magistrate on a showing of "probable cause to believe that mass violations of the Immigration laws" were being committed at the location of the San Clemente checkpoint (A. 52)—should eliminate that doubt.

Although the focus of the warrant is unavoidably "less precise than that directed against more conventional types of crime" (*United States* v. *United States District Court*, 407 U.S. 297, 322), the unique law enforcement problem justifies an unconventional solution. "Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government * * * and the protected rights of our citizens" (*id.* at 322–323). Five Justices expressed the view in *Almeida-Sanchez* v. *United States*, 413 U.S. 266, that a warrant authorizing routine roving patrol searches of automobiles in a prescribed area may issue, consistent with the Fourth Amendment, on the basis of area-type probable cause. The warrant here is even more clearly compatible with the Fourth Amendment, for it authorizes a far less substantial invasion and is limited to a particular fixed location rather than an area encompassing many square miles.

Even if the magistrate's advance approval of the operation cannot properly be labeled a "warrant" within the strict meaning of the second clause of the Fourth Amendment, it does reflect a "prior judicial judgment" (*United States* v. *United States District Court, supra*, 407 U.S. at 317) that the legitimate needs of law enforcement justify the limited intrusions that result from the checkpoint stop and inquiry procedure. That prior judgment is entitled to weight in the reasonableness balance.

B. The magistrate's finding of probable cause was amply supported by the affidavits and other materials presented to him. The San Clemente checkpoint is the primary checkpoint in Southern California. It is strategically located at a point on Interstate Route 5 where the concentration of illegally transported aliens is high and the overall volume of traffic is relatively

low. The checkpoint acts as a powerful deterrent to illegal entry and transportation of aliens.

Moreover, only a small fraction of the vehicles that pass the checkpoint during its hours of operation are stopped to permit inquiry concerning the occupants' nationality and immigration status. Those that are stopped are detained for only a few minutes. Though the interference with lawful traffic is thus kept to a minimum, the deportable alien apprehension rate at the checkpoint is high. The magistrate struck a proper balance between the legitimate needs of the Border Patrol and the rights of innocent travelers.

ARGUMENT

I

THE STOPS OF RESPONDENTS' VEHICLES AT THE SAN CLEMENTE CHECKPOINT AND THE BRIEF INQUIRIES CONCERNING THE OCCUPANTS' NATIONALITY AND IMMIGRATION STATUS WERE REASONABLE UNDER THE FOURTH AMENDMENT WITHOUT REGARD TO THE WARRANT AUTHORIZING SUCH STOPS AND INQUIRIES

A. THE IMPORTANT LAW ENFORCEMENT INTEREST AT STAKE JUSTIFIES THE MINIMAL INTRUSION INVOLVED IN A BRIEF STOP AND INQUIRY AT A FIXED CHECKPOINT

An investigative stop of a vehicle is a seizure under the Fourth Amendment, but, like a street encounter, it "involve[s] only a brief detention short of traditional arrest" (*United States* v. *Brignoni-Ponce,* No. 74–114, decided June 30, 1975, slip op. 4). The stop and inquiry procedure followed by the Border Patrol officers in this case must therefore be tested under "the reasonableness requirement of the Fourth Amendment" (*id.* at 8–9). And, as this Court stated in the

context of roving patrol stops, "the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers" (*id.* at 5).

In *Brignoni-Ponce,* the Court was "not convinced that the legitimate needs of law enforcement require [the] degree of interference with lawful traffic" that would result if "Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law" (*id.* at 9–10). Consequently, the Court was "unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops" (*id.* at 8).

The stops and inquiries in this case were conducted not by officers on roving patrol but at the Border Patrol's most important immigration traffic checkpoint. That difference is of controlling significance, for it substantially affects both sides of the reasonableness balance—the extent of the law enforcement need and the nature of the official intrusion.

1. *Effective enforcement of the nation's immigration laws in the Mexican border areas requires routine stopping of vehicles at strategically placed traffic checkpoints for the purpose of making brief inquiries*

a. The effective policing of our national boundaries to prevent the illegal entry of aliens, particularly in the area of our land border with Mexico, presents ex-

traordinarily difficult law enforcement problems. Rather than reiterating the lengthy description of those problems that we presented in our briefs last Term in *Brignoni-Ponce* and *United States* v. *Ortiz*, No. 73-2050,[5] and that appears in the district court's opinion in *United States* v. *Baca*, 368 F. Supp. 398 (S.D. Cal.),[6] we are content to quote this Court's brief summary in *Brignoni-Ponce* (slip op. 6):

> The Mexican border is almost 2,000 miles long, and even a vastly reinforced Border Patrol would find it impossible to prevent illegal border crossings. Many aliens cross the Mexican border on foot, miles away from patrolled areas, and then purchase transportation from the border area to inland cities, where they find jobs and elude the immigration authorities. Others gain entry on valid temporary border-crossing permits, but then violate the conditions of their entry. Most of these aliens leave the border area in private vehicles, often assisted by professional "alien smugglers."

Because "it is the automobile which in most cases makes effective the attempts to smuggle aliens into this country" (*Almeida-Sanchez* v. *United States*, 413 U.S. 266, 279, concurring opinion of Mr. Justice Powell), the Border Patrol has found that traffic checking operations are absolutely essential "[i]f there is to be any hope of intercepting illegal entrants

[5] We have furnished respondents' counsel with copies of our briefs in those cases.

[6] Pertinent portions of the district court's opinion in *Baca* are appended to the concurring opinion of the Chief Justice in *Brignoni-Ponce*, slip op. 3–16.

and of maintaining any kind of credible deterrent" (*id.* at 293, dissenting opinion of Mr. Justice White). However, "it is simply not possible in most cases for the Government to obtain specific knowledge that a person riding or stowed in an automobile is an alien illegally in the country" (*id.* at 276–277, concurring opinion of Mr. Justice Powell).

Until this Court's decisions in *Almeida-Sanchez*, *Ortiz*, and *Brignoni-Ponce*, the Border Patrol, exercising the authority conferred by Congress in 8 U.S.C. 1357(a), responded to this difficult law enforcement problem by conducting a comprehensive traffic checking program in the border area—a program that included some routine stopping and searching of vehicles for aliens both at checkpoints and on roving patrols. Significant aspects of that program have been found unreasonable under the Fourth Amendment. The Border Patrol now conducts searches of vehicles only on the basis of probable cause or consent, and it stops vehicles on roving patrol only on the basis of reasonable suspicion.

What is left of the original traffic checking program—routine stops for the purpose of brief inquiries at fixed checkpoints—has always been the single most important element of the enforcement plan, in terms both of apprehending illegal entrants and of deterring unauthorized entry. As we indicated in oral argument before this Court in *Ortiz*, although roving patrol operations have historically been an important part of the Border Patrol's traffic checking program, "they have always been essentially supplementary to the

checkpoints themselves which are the heart of the enforcement effort" (Tr. 19). And see our brief in *Ortiz,* p. 24. Experience has shown that most of the inland vehicular movement of illegal entrants is on the major highways leading north from the border, and it is on those roads that the fixed checkpoints are placed, forming an "effective obstacle" to such inland movement. *United States* v. *Baca, supra,* 368 F. Supp. at 407.

Moreover, although it has been the Border Patrol's experience that a truly effective deterrent requires the authority on occasion to conduct a physical inspection of some vehicles in order to determine whether aliens are concealed in them, it is also true that only a small proportion of the illegal entrants actually apprehended at traffic checkpoints are found concealed in compartments (see Tr. of oral argument in *Ortiz,* pp. 13, 15). A brief stop and inquiry obviously cannot accomplish all the enforcement objectives that would be achieved by a limited search for concealed aliens. But, as the facts in the present case indicate, many illegal entrants are discovered riding in the passenger compartments of vehicles, and an experienced officer's observations at the time of a stop frequently give him probable cause to believe that the vehicle does contain concealed aliens (see *Ortiz,* slip op. 6–7).

Thus, while the absence of routine roving patrol stops and checkpoint searches undoubtedly makes it easier for illegal entrants to evade detection, routine checkpoint stops remain an effective and essential means of immigration law enforcement. Nine-month

statistics for the San Clemente checkpoint, compiled at a time when neither routine roving patrol operations nor routine checkpoint searches were being conducted, show that officers stopped 12,007 vehicles (less than one-half of one percent of those that passed the checkpoint during its hours of operation) and found a total of 8,591 deportable aliens in 2,998 (or about 25 percent) of the vehicles stopped (Pet. App. 56a, 63a).

Officers assigned to checkpoint operations, particularly at San Clemente, where traffic is heavy, endeavor to stop for inquiry only those vehicles that appear to the officers to "break * * * the pattern" of normal traffic (*Baca* Tr. 325). Some of the factors that may lead an officer to conclude that a brief stop is warranted are stated in the opinion in *Brignoni-Ponce,* slip op. 11–12. In many cases, however, particularly those involving professional smugglers, it is simply not possible until *after* a stop and inquiry to observe suspicious signs suggesting the possible presence of illegal entrants. If the checkpoints are to function effectively as a deterrent to illegal entry, they must pose a serious obstacle to the professional as well as the unsophisticated. For that reason, the Border Patrol has considered it essential to make some stops on an essentially random basis, so that even the most carefully disguised smuggling operation will face some risk of detection at a checkpoint.

A requirement that officers must have a "reasonable suspicion" before stopping a vehicle at a checkpoint would substantially undermine the deterrent

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effectiveness of the checkpoints and make it difficult, if not impossible, to operate them productively. Officers on roving patrol are able to follow a vehicle and observe it at reasonably close range for a long enough period to determine whether there are objective, articulable facts that amount to a reasonable suspicion that the vehicle may contain aliens who are illegally in the country. Officers at a checkpoint, by contrast, have only a fleeting opportunity to observe vehicles as they approach the checkpoint and are seldom in a position to determine whether there is a "reasonable suspicion" of illegal activity.

Some vehicles are stopped at checkpoints on the basis of articulable factors suggesting a break in the pattern of normal traffic. But there is an obvious limit to what even a trained and experienced officer can observe in a brief glance at an approaching vehicle, and the factors that may suggest a break in the traffic pattern may not amount to a "reasonable suspicion" as that phrase was used by the Court in *Brignoni-Ponce*. Indeed, if the Ninth Circuit's application of the reasonable suspicion standard in recent decisions represents a correct understanding of the governing test, it may be impossible except in the most extraordinary circumstances for a checkpoint officer to observe facts sufficient to warrant a stop on that basis.[7]

[7] The decision in *United States* v. *Osborne*, C.A. 9, No. 75–1595, decided July 3, 1975 (reproduced in the Appendix to this brief, *infra*, p. 65) highlights the problem. A customs patrol officer on roving patrol stopped a suspicious vehicle near the border, smelled marihuana from outside the vehicle as he approached it, and subsequently found a large quantity of the substance in the vehicle's trunk. The district court denied a motion to suppress, concluding, on the basis of the following findings of fact (contained in an order reproduced in the Appendix, *infra*, pp. 61–64), that the officer had a founded suspicion justifying the stop (*id.* at 61-62; footnote omitted):

"At approximately 11:45 o'clock a.m., November 11, 1974, Supervisory Customs Patrol Officer J. C. Padalino observed a 1969 white over red Ford Galaxie traveling north at Milepost 2, approximately two miles north of the United States-Mexico International Boundary. The defendant was the driver of the vehicle. Officer Padalino noticed that the car was riding low, despite the fact that it appeared to have heavy duty "air shocks". The vehicle did not have a trailer hitch. Padalino also observed what appeared to be fingerprint smudges on the vehicle's trunk.

"Through a radio check, Padalino discovered that the vehicle was registered to Richard R. or M. E. Quiroz, of Kearny, Arizona. Kearny is some one hundred miles north of the International Boundary. Officer Padalino noted that the name "Quiroz" is of Mexican or Spanish origin, while the driver of the subject vehicle appeared to be of Anglo-American origin.

"While awaiting the results of the registration check, Padalino observed that the defendant displayed numerous nervous characteristics. The vehicle, which was first observed traveling at approximately the posted speed limit of fifty-five miles per hour, slowed down to a speed of forty miles per hour. When Padalino followed the subject vehicle, the defendant repeatedly looked through his rear view mirror. His vehicle swerved on the roadway. When Padalino would drive his vehicle in the lane adjacent to the defendant's vehicle, the defendant would not look at Padalino or Padalino's marked Patrol vehicle. Padalino noted that the defendant sat very rigid in the driver's seat, maintaining a firm grip on the steering wheel with one hand, while moving his other hand nervously.

"Because of these circumstances, Padalino stopped the defendant's vehicle at approximately Milepost 10 on Interstate 19.* * *"

The court of appeals reversed the conviction. Its unpublished

Thus, while the Court in *Brignoni-Ponce* concluded that "a requirement of reasonable suspicion for stops

allows the Government adequate means of guarding the public interest" (slip op. 10), that conclusion was bottomed in part upon "the character of roving-patrol stops" (*id.* at 10, n. 8). Because of the quite different character of checkpoint stops, a reasonable suspicion requirement for those operations would *not* leave the Border Patrol with adequate means for achieving legitimate law enforcement objectives.

After the Ninth Circuit's decision in the present case, in effect imposing a reasonable suspicion requirement for checkpoint stops, and in light of the Ninth Circuit's rulings on the contours of the "founded suspicion" concept (see note 7, *supra*), the Border Patrol felt it had little choice but to abandon most

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opinion stated, in full: "The facts are too thin to sustain founded suspicion. On remand, the indictment will be dismissed" (App., *infra*, p. 65). Compare *United States* v. *Morey*, C.A. 9, No. 75-1332, decided June 10, 1975 (reproduced at App., *infra*, pp. 67–70), where, on facts nearly identical to those in *Osborne*, the court of appeals concluded that "[t]here was ample justification for the stop" (*id.* at 67).

We did not file a petition for a writ of certiorari in *Osborne* principally because of the essentially factual nature of the decision, and we do not here argue its merits. What the decision illustrates is that it is difficult even for officers on roving patrol to develop a "reasonable suspicion" sufficient to satisfy some panels of the Ninth Circuit. For the reasons indicated in the text, that difficulty would be intensified for an officer at a checkpoint, whose opportunity to observe a moving vehicle is drastically reduced.

We note that the Ninth Circuit's erratic application of the founded suspicion standard has been the subject of recent scholarly criticism. Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A.J. 1224, 1226 (1975); Weisgall, *Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion*, 9 U.S.F. L. Rev. 219 (1974).

checkpoint operations in California and Arizona.[8] It concluded that a reasonable suspicion requirement would so limit the effectiveness and productivity of the checkpoints that continued allocation of resources to checkpoint operations would not be justified.

With the substantial deterrent effect of the checkpoints thus eliminated, illegal entrants can now freely travel inland without substantial risk of apprehension through traffic checking operations. The Immigration and Naturalization Service has informed us that, as might be expected, the formerly high price charged by smugglers to assist aliens in entering this country illegally and traveling inland (see *United States* v. *Baca*, *supra*, 368 F. Supp. at 408; *Baca* Tr. 185, 411, 421–422) has dropped dramatically. That information tends to confirm the district court's finding in *Baca* that "[t]he checkpoints are the major reason for such

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[8] The government sought to renew the warrant for the San Clemente checkpoint in order to maintain operations there pending further judicial review. District Judge Turrentine, and thereafter Circuit Judge Carter, while concluding on the basis of the government's applications that "there exists probable cause to operate the checkpoint at this time" (Pet. App. 48a, 49a), felt constrained to deny the applications because of the decision in this case. Consequently, following the expiration of warrants that were outstanding on the date of the court of appeals' decision in this case, the Border Patrol ceased routine traffic checking operations at all checkpoints within the jurisdiction of the Ninth Circuit.

In the Fifth and Tenth Circuits, where the courts of appeals have approved the warrantless stop and inquiry procedure at checkpoints (*United States* v. *Santibanez*, 517 F. 2d 922 (C.A. 5); *United States* v. *Bowman*, 487 F. 2d 1229 (C.A. 10)), the Border Patrol has continued its routine checkpoint operations without obtaining judicial warrants.

a high price and if they were discontinued for any length of time it would be one more encouragement to illegal immigration" (368 F. Supp. at 408).

In sum, the legitimate governmental interest in making routine stops of vehicles at checkpoints is substantially greater than the interest in making such stops on roving patrol, both because the checkpoint operations are more important to the Border Patrol's enforcement effort and because a requirement of reasonable suspicion would be unworkable at a checkpoint.

b. The court of appeals thought that the Border Patrol's enforcement problems could be solved by means other than routine checkpoint stops (Pet. App. 25a–27a). But the alternatives suggested by the court would neither wholly eliminate the problem nor obviate the need for an effective means of deterring vehicular transportation of illegal immigrants on the major roads.

The court of appeals suggested that the Border Patrol could intensify efforts on the line watch to prevent surreptitious illegal border crossings (Pet. App. 25a–26a). As the evidence in the *Baca* hearing amply demonstrated, however, and as this Court recognized in *Brignoni-Ponce,* "even a vastly reinforced Border Patrol would find it impossible to prevent illegal border crossings" (slip op. 6); "[i]ncreased manpower on line watch would not make that activity appreciably more effective" (368 F. Supp. at 405). See the government's reply brief in *Ortiz,* pp. 3–5.

The court of appeals also suggested that Congress could reduce the economic incentive that attracts illegal entrants from Mexico "by imposing sanctions on employers who hire 'illegal' aliens". (Pet. App. 26a). See Mr. Justice White's concurring opinion in *Brignoni-Ponce* and *Ortiz.* Several bills designed in part to impose such sanctions have been considered by Congress in recent years, and a freshly revised version (H.R. 8713), making unlawful the knowing employment of aliens present in this country unlawfully, was only recently reported favorably to the House by the Judiciary Committee (H.R. Rep. No. 94–506, 94th Cong., 1st Sess. (1975)).

Enactment of legislation like that under consideration would obviously help lessen the enormous law enforcement burdens now borne by the Border Patrol. But there is no assurance that it would wholly eliminate the problem of unlawful entry or render unnecessary the Border Patrol's traffic checking operations. Legislation is not an *alternative* but an important *complement* to an effective law enforcement program. Neither, in the absence of the other, can reasonably be expected to bring the problem of illegal immigration wholly under control. And the fact that Congress is considering and could enact legislation imposing sanctions on the knowing employment of illegal immigrants does not deflate the present law enforcement need for authority to make brief stops and inquiries at traffic checkpoints.

The court of appeals' other legislative suggestions—that Congress abolish the alien commuter system (see *Saxbe* v. *Bustos,* 419 U.S. 65) and eliminate temporary visitor permits—would have little impact on the Border Patrol's law enforcement problems. Only a

relatively small proportion of the deportable aliens apprehended by the Border Patrol enter this country lawfully and then violate the terms of their entry. In Fiscal Year 1975, according to figures furnished to us by the Immigration and Naturalization Service, more than 96 percent of the deportable aliens apprehended by the Border Patrol had entered this country surreptitiously without presenting themselves for inspection at a port of entry, and nearly 99 percent of those who entered without inspection were Mexican nationals.[9]

The inescapable conclusion is that there is no reasonably practicable alternative to a Border Patrol law enforcement program that includes as an essential element the stop and inquiry procedure at traffic checkpoints that was followed in this case.

2. A brief stop and inquiry at a fixed traffic checkpoint is significantly less intrusive than either a search for aliens at a checkpoint or a stop and inquiry by a roving patrol

The brief stop of a vehicle at a fixed traffic checkpoint to ask its occupants about their citizenship and right to be in the United States, while perhaps not trivial, can fairly be characterized as a "minimal intrusion" (*United States* v. *Brignoni-Ponce, supra,* slip op. 8) resulting in no more than a slight "interference with individual liberty" (*id.* at 6). The Immigration and Naturalization Service informs us that a stop for questioning at a checkpoint ordinarily takes

[9] The Service-wide figures, including apprehensions by all elements of the Immigration and Naturalization Service, are 87 percent and 98 percent, respectively.

no more than about five seconds per occupant. Such stops involve no search unless the officers have probable cause to believe that the vehicle contains concealed aliens or contraband (or unless consent is given for a search). All that is ordinarily required of the occupants is a response to a brief question or two and possibly the production of a document (see 8 U.S.C. 1304(e)) evidencing a right to be in the United States.

The checkpoint stop and inquiry procedure obviously does not entail the kind of intrusion into protected Fourth Amendment interests that was involved in even the limited checkpoint search for aliens conducted in *Ortiz,* a search that this Court characterized as "a substantial invasion of privacy" (slip op. 5). As the Court noted in *Ortiz,* a stop "is considerably less intrusive than a search" (slip op. 4).

We submit, moreover, that a checkpoint stop is significantly less intrusive than a roving patrol stop, and that the balance of reasonableness struck by the Court in *Brignoni-Ponce* should accordingly shift in the present case. We made a similar argument in *Ortiz* in an effort to distinguish checkpoint searches from roving patrol searches, and the Court's summary of our contention there fairly states our position here (slip op. 4):

> [T]he circumstances surrounding a checkpoint stop * * * are far less intrusive than those attending a roving-patrol stop. Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles are being stopped, he can

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see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion.

Although the Court was not persuaded by our argument in *Ortiz,* it agreed that "[t]hese differences are relevant to the constitutional issue, since the central concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials" (*ibid.*). The Court concluded that the distinctions between a roving patrol stop and a checkpoint stop did not significantly differentiate the intrusiveness of the subsequent *search,* which in either situation amounted to "a substantial invasion of privacy" (*id.* at 5).

The Court acknowledged, however, that "the differences between a roving patrol and a checkpoint *would* be significant in determining the propriety of the stop" (*id.* at 4; emphasis added), and it accordingly left open the question "whether checkpoints and roving patrols must be treated the same for all purposes, or whether Border Patrol officers may lawfully stop motorists for questioning at an established checkpoint without reason to believe that a particular vehicle is carrying aliens" (*id.* at 6, n. 3).

Thus, the Court has already recognized that checkpoint stops may be significantly less intrusive than roving patrol stops. In our view, that difference is controlling, particularly when taken together with the increased governmental need for authority to conduct a checkpoint stop and inquiry procedure. While "[t]he greater regularity attending the stop does not mitigate the invasion of privacy that a search entails" (*id.* at 4), it does substantially reduce the potentially frightening and annoying aspects of a roving patrol stop (see Mr. Justice Rehnquist's concurring opinion in *Ortiz*). And, if "checkpoint procedures [do not] significantly reduce the likelihood of embarrassment" for "[m]otorists whose cars are searched," those procedures do minimize any potential embarrassment, we submit, for "those who are only questioned" (*Ortiz,* slip op. 5).

The court of appeals in this case invoked the language of this Court's opinion in *Carroll* v. *United States,* 267 U.S. 132, 154, that "those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search" (see Pet. App. 34a). In *Carroll,* however, the Court was considering "under what circumstances [a] search [for contraband] may be made" (267 U.S. at 153). There is no search involved here, and the quoted language should not be extrapolated beyond the context in which it was used.

It is undeniable that motorists stopped for inquiry at a checkpoint are subjected to a brief "interruption" in their use of the highway. But that interruption is not significantly more intrusive than the interruption caused by a traffic light or a stop sign. Unlike the situation in a roving patrol stop, motorists are not pursued by a patrol car with flashing lights and siren. No officer conducts a search of the vehicle. The total time consumed by the interruption is ordinarily less than a minute.

Although traffic lights and stop signs are erected to serve highway safety rather than immigration law enforcement objectives, the different purposes do not affect the intrusiveness of the interruption. And, while law enforcement officers do not normally address questions to motorists stopped at a traffic light, Border Patrol officers at a checkpoint make only the briefest inquiry concerning the occupants' citizenship and immigration status. Except where suspicious circumstances require a more elaborate explanation, no one is detained more than momentarily and no one is subjected to extended interrogation. We doubt that the usual five-second inquiry addressed to a motorist or his passengers so alters the nature of the "interruption" as to transform an otherwise trifling pause into a constitutionally prohibited invasion of privacy.

The Court in *Ortiz* was "not persuaded that the checkpoint limits to any meaningful extent the officer's discretion to select cars for search," and it concluded that "[t]his degree of discretion to search private automobiles is not consistent with the Fourth Amendment" (slip op. 5). Although at some checkpoints, such as San Clemente, where the volume of traffic precludes the stopping of every vehicle, the officers exercise a similar degree of discretion in selecting cars for a stop and inquiry, there is nothing inherently improper about law enforcement discretion. What the Court found unacceptable in *Ortiz* was the officers' "discretion to search." No such discretion is exercised or claimed here (except, of course, where there is probable cause or consent).

Similarly, while the Court in *Brignoni-Ponce* concluded that giving roving patrol officers "broad and unlimited discretion" (slip op. 9) to make stops would be inconsistent with the reasonableness requirement of the Fourth Amendment, the kind of discretion that concerned the Court there is not involved here. An officer at a checkpoint has no discretion to "stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road" (*ibid.*). The basic decisions regarding the location of a checkpoint, its hours of operation, and the traffic checking procedures to be followed are made by relatively high-ranking officials of the Border Patrol, taking into account "the degree of inconvenience to the public and the potential for safe operation, as well as the potential for detecting and deterring the illegal movement of aliens" (*Ortiz,* slip op. 4). See *United States* v. *Baca, supra,* 368 F. Supp. at 406.

Thus, while a checkpoint officer necessarily retains discretion to select certain vehicles for a stop and inquiry, he has no roving mandate to stop all vehicles anywhere in the border area. His responsibility is limited to a fixed location, strategically selected to minimize the interference with lawful traffic. And, as we have stated, his decision to stop an approaching vehicle occasions a significantly lesser intrusion than may result when a roving patrol officer, cruising in a patrol car, decides to pursue a vehicle and direct it to the side of the road.

B. THE REASONABLENESS OF THE CHECKPOINT STOP AND INQUIRY PROCEDURE DOES NOT DEPEND UPON PRIOR JUDICIAL APPROVAL THROUGH A WARRANT PROCEDURE

Although the central inquiry here is whether the stop and inquiry procedure at traffic checkpoints is reasonable under the Fourth Amendment, we recognize that "the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause" (*United States* v. *United States District Court,* 407 U.S. 297, 315) and therefore that "a prior judicial judgment" (*id.* at 317) concerning the justification for operating a particular checkpoint may affect the reasonableness of the operation. The stop and inquiry procedure involved in the present case was in fact authorized in advance by a federal magistrate,[10] and we argue in the next section of this brief that the resulting warrant was properly issued and that the advance judicial approval it reflects contributes to the reasonableness of the law enforcement measures it authorized.

The court of appeals, however, concluded that the warrant was constitutionally invalid (Pet. App. 16a–32a). While we contend that the court's analysis was faulty, this Court need not reach that question if, as we here argue, the checkpoint stop and inquiry procedure was reasonable regardless of the warrant.

We think our preceding discussion demonstrates that the minimal intrusions occasioned by checkpoint

[10] On November 11, 1975, this Court granted certiorari in *Sifuentes* v. *United States*, No. 75–5387, and ordered that it be set for argument in tandem with the present case. *Sifuentes* also involves a checkpoint stop and inquiry, but the operation there had not been authorized in advance by a judicial officer.

stops are justified by a compelling law enforcement need. We submit that the additional assurance of reasonableness that a warrant might provide is unnecessary in the context of checkpoint stops and that, because of significant practical problems, a warrant requirement might frustrate the law enforcement objectives served by the traffic checkpoints.

1. *Advance judicial approval is unnecessary*

a. The "seizure" involved in the stopping of an automobile at a checkpoint and the brief questioning of its occupants is so limited an intrusion into the privacy interests protected by the Fourth Amendment that the interposition of a magistrate is unnecessary to ensure its reasonableness. Just as the nature of the cause necessary to justify a particular search or seizure depends in part upon the extent of the intrusion contemplated (*Terry* v. *Ohio,* 392 U.S. 1, 17–18, n. 15; *United States* v. *Brignoni-Ponce, supra,* slip op. 6–7), so should the need for a warrant turn in part upon the scope of the official interference with protected interests.

For example, "broad and unsuspected governmental incursions into conversational privacy [through] electronic surveillance" may "jeopard[ize] * * * constitutionally protected speech" and, particularly when directed against "those suspected of unorthodoxy in their political beliefs," may make "Fourth Amendment protections * * * the more necessary" (*United States* v. *United States District Court, supra,* 407 U.S. at 313–314). The magnitude of "the potential danger posed by

unreasonable surveillance to individual privacy and free expression" (*id.* at 315) heightens the "risk" involved in relying solely on "unreviewed executive discretion" as a guarantee of reasonableness (*id.* at 317). In those circumstances, this Court concluded that "the needs of citizens for privacy and free expression may * * * be better protected by requiring a warrant before such surveillance is undertaken" (*id.* at 315).

When law enforcement officers use less "constitutionally sensitive means in pursuing their tasks" (*id.* at 317), however, a warrant may not always be required. In *Cardwell* v. *Lewis,* 417 U.S. 583, 589, for example, four members of this Court concluded that the scraping of paint from the exterior of an automobile did not "invade * * * a right to privacy which the interposition of a warrant requirement is meant to protect." And in *Brignoni-Ponce,* where the Court concluded that suspicious vehicles could be stopped by roving patrol officers in the Mexican border area, there was no suggestion that prior judicial approval of a roving patrol operation would be required.

The brief stop and verbal exchange involved in the checkpoint practices at issue here do not, in our view, present the sort of dangers that a warrant is ordinarily designed to protect against. Unlike routine roving patrol searches, which Mr. Justice Powell thought could be justified only if advance judicial approval were obtained (*Almeida-Sanchez* v. *United States, supra,* 413 U.S. at 279–285, concurring opinion), checkpoint stops involve no "substantial invasion of privacy" (*United States* v. *Ortiz, supra,* slip

op. 5). Indeed, as we have shown, a checkpoint stop is even less intrusive—and therefore less "constitutionally sensitive" (*United States* v. *United States District Court, supra,* 407 U.S. at 317)—than the roving patrol stop in *Brignoni-Ponce.* We believe that the need for advance judicial approval is correspondingly reduced.

b. Moreover, because a checkpoint is stationary and its routine operation is consistent from day to day and even from year to year, there is little need for periodic *ex parte* judicial approval in *advance* of its operation during a particular week or month. The reasonableness of the checkpoint's operation can effectively be adjudicated for the first time in an adversary criminal proceeding, and, once the court has determined that the operation of a particular checkpoint is reasonable, that reasonableness would not be substantially enhanced by repeated approvals in advance of subsequent periods of operation.

By the same token, if the court determined in the context of a motion to suppress that the operation of a particular checkpoint was unreasonable, that determination, unlike a refusal to issue a warrant, would be subject to appellate review under 18 U.S.C. 3731.

We recognize that the determination whether to conduct a checkpoint operation "involves a balancing of the legitimate interests of law enforcement with protected Fourth Amendment rights" and therefore could be said to present "the type of delicate question of constitutional judgment which ought to be resolved by the Judiciary rather than the Executive" (*Almeida-*

Sanchez v. *United States, supra,* 413 U.S. at 284, Mr. Justice Powell concurring). In view of the special characteristics of fixed checkpoints, however, that judicial determination, once made for a particular checkpoint in the context of a motion to suppress, serves the same function that would be served in other circumstances by a warrant.

Since the reasonableness of the operation as a whole is the principal issue with respect to a checkpoint, and since the operation is ordinarily subject to no variation in terms of location and little if any in terms of operating procedure, an initial judicial determination that a particular checkpoint stop and inquiry was reasonable can and should suffice to validate the future similar operation of the checkpoint as well.[11]

That is not to say that an aggrieved person may not thereafter allege and prove in a particular factual setting that the stop of his automobile was unlawful or that the checkpoint's operation is unreasonable. We submit, however, that the Fourth Amendment values at stake are adequately protected when those claims are adjudicated *after* a checkpoint search has been conducted and in the context of an adversary proceeding on specific facts. To require frequent, periodic, *ex parte* presentations by the government to justify continuation of a checkpoint's operation would spend valuable judicial and administrative resources to achieve no important Fourth Amendment purpose.

[11] Indeed, the district court's opinion in *Baca* amounts to a determination that the checkpoints in the southern California area are reasonably located and reasonably operated in light of the public interest involved and the nature and extent of the intrusions contemplated.

2. A warrant procedure for checkpoints may frustrate legitimate law enforcement objectives

The Border Patrol operates 17 permanent and 30 temporary checkpoints in California, Arizona, New Mexico, and Texas, within the jurisdiction of six different federal judicial districts.[12] Though spread over the entire southwest border region, the checkpoints form a cohesive network in which each is coordinated with others in the same vicinity. The deterrent effectiveness of the entire network depends upon that coordination.

As the district court found in *Baca,* "[t]he placement of the checkpoints and their operations are coordinated between the two sectors located in this district and with Border Patrol activities to the east in Arizona" (368 F. Supp. at 407). Consequently, "the checkpoints in the Southern District ought to be conceptualized as parts of a systemic, integrated whole in which each part is, to some extent, interdependent upon the functioning of the other parts" (*id.* at 417).

In the Chula Vista Sector in California, for example, where "[t]he San Clemente checkpoint is the cornerstone of the checkpoint system" (*id.* at 415), its location determines the location of the others, because "each checkpoint relates to all others in such a manner as to preclude evasion by the use of bypass

[12] Central District of California, Southern District of California, District of Arizona, District of New Mexico, Western District of Texas, Southern District of Texas.

roads" (*id.* at 416). Thus, "[t]he checkpoints in the Chula Vista Sector reenforce each other and each prevents the circumvention of any other checkpoint; they are a system and one cannot be tampered [with] without affecting the positioning of the others" (*ibid.*).

The interrelationship of the Border Patrol's 47 checkpoints makes it difficult to structure a workable warrant procedure. For a court to review the basic agency decision to operate a particular checkpoint would require consideration of information relating not only to the checkpoint in question but also to other checkpoints in the same sector[13] as well as checkpoints in neighboring sectors. Denial of a warrant for a particular checkpoint could seriously reduce the deterrent effectiveness of the entire system, and it may not always be possible to obtain prompt judicial approval of revised plans to compensate for the absence of a particular checkpoint.

Even if it would be feasible to seek warrants for all the checkpoints in a judicial district at one time—that is, to make periodic *ex parte* presentations of information such as that presented in an adversary context in the consolidated proceeding in *Baca*—the magistrate or judge presumably could not issue warrants for any coordinate checkpoints located outside his judicial district (Rule 41(a), Fed. R. Crim. P.). The relationship between the checkpoints, however, does not end at the district boundary. If the magis-

[13] There are nine Border Patrol "sectors" in the southwest region, each of which is headed by a Chief Patrol Agent.

trates in neighboring districts should take different views of the information presented to them, the coordination of the system, and its deterrent effectiveness as a whole, could be seriously disrupted. That risk of disruption would, of course, increase geometrically to the extent that warrants for each checkpoint must be justified and obtained separately from a variety of issuing magistrates.

There is another practical problem. To maximize the effectiveness of the Border Patrol's overall traffic checking operations, experience has shown that the Chief Patrol Agent in each sector must retain flexibility in operating the various checkpoints within his jurisdiction. It is not always possible to anticipate when law enforcement strategy will require the operation of a particular checkpoint.

At times, specific information about expected smuggling activity, changed weather or manpower conditions, or perhaps just the seasoned judgment of an experienced patrol agent will indicate, for example, that a regular checkpoint should be shut down for an afternoon and an infrequently used temporary checkpoint be placed in operation. But the need may not arise frequently enough or with sufficient predictability to justify seeking a warrant for it during any particular week. The effect of a warrant requirement in circumstances like these could be to confine the Border Patrol's enforcement efforts to those checkpoints operated regularly and thereby to diminish the effectiveness of the traffic checking operations as a whole. To that extent, it would "frustrate the govern-

mental purpose'' behind that program (*Camara* v. *Municipal Court*, 387 U.S. 523, 533).

II

IF ADVANCE JUDICIAL APPROVAL IS NEEDED TO ENSURE THE REASONABLENESS OF A CHECKPOINT STOP AND INQUIRY PROCEDURE, THE WARRANT HERE SATISFIED THAT NEED

In his concurring opinion in *Almeida-Sanchez*, Mr. Justice Powell suggested that it would be possible to "reconcil[e] the obvious needs of law enforcement with relevant constitutional rights" (413 U.S. at 277) by requiring, in the case of routine roving patrol searches, that the government "obtain advance judicial approval of the decision to conduct roving searches on a particular road or roads for a reasonable period of time" (*id.* at 283). That advance approval, in Mr. Justice Powell's view, could be reflected in a warrant issued by a judge or magistrate on the basis of "supporting information relat[ing] to criminal activity in certain areas rather than to evidence about a particular automobile" (*id.* at 281–282).

Recognizing that "it is simply not possible in most cases for the Government to obtain specific knowledge that a person riding or stowed in an automobile is an alien illegally in the country" (*id.* at 276), Mr. Justice Powell reasoned that "on appropriate facts the Government can satisfy the probable cause requirement for a roving search in a border area without possessing information about particular automobiles" (*id.* at 281). While the focus of the resulting warrant obviously would be "'less precise than that directed against

more conventional types of crime,'" "the novelty of the problem posed by roving searches in border areas" required, in Mr. Justice Powell's view, an unconventional solution: "'[d]ifferent standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government . . . and the protected rights of our citizens'" (*id.* at 284–285, quoting from *United States* v. *United States District Court, supra*, 407 U.S. at 322–323).

The four dissenting Justices in *Almeida-Sanchez*, while disagreeing with Mr. Justice Powell over the need for an area-type search warrant, agreed with his view that "such a warrant so issued would satisfy the Fourth Amendment" (413 U.S. at 288).

The warrant in the present case (A. 52–53) is the type envisioned by Mr. Justice Powell and the four dissenting Justices in *Almeida-Sanchez*, with two important exceptions. It authorized Border Patrol officers to stop vehicles and make limited inquiries of the occupants, not to search the vehicles for aliens,[14] and it permitted such operations to be conducted, not on several roads in an "area," but at a specified loca-

[14] Although the warrant authorized the officers "to conduct a routine inspection of said vehicles for the presence of aliens" (A. 53), it was not clear whether "inspection" was intended to imply "search," and in any event the Border Patrol did not conduct routine searches of the interior of vehicles. Such searches, under the warrant in this case and under other warrants issued thereafter for the San Clemente checkpoint, were conducted only on the basis of probable cause or consent. The court of appeals accordingly stated that it was "not directly concerned" in this case with the "inspection" authority conferred by paragraph (3) of the warrant, and it did "not consider any argument that the warrant is invalid because paragraph (3) is too broadly drawn" (Pet. App. 7a–8a, n. 3). As the court noted, "later renewals of the warrant

tion—the fixed traffic checkpoint near San Clemente, California.

We have already argued that the stops in this case were reasonable without regard to the warrant. We argue here that the advance judicial approval reflected in the warrant sufficiently enhances the reasonableness of the law enforcement conduct it authorized to remove any residual doubt regarding the propriety of the stops, and that the warrant represents a proper "balancing of the legitimate interests of law enforcement with protected Fourth Amendment rights" (*Almeida-Sanchez* v. *United States, supra,* 413 U.S. at 284, Mr. Justice Powell concurring).

A. THE WARRANT IS COMPATIBLE WITH THE FOURTH AMENDMENT, AND IT ENHANCES THE REASONABLENESS OF THE STOP AND INQUIRY PROCEDURE AT THE CHECKPOINT

In assessing the validity of the stops in this case, the court of appeals gave no weight to the existence of the warrant, because, in its view, "the concept of an area warrant [in other than administrative inspection cases] * * * is contrary to certain fundamental

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deleted the authority to 'inspect' and limited agents to the stop and inquiry procedure" (*ibid.*).

The officers who stopped respondent Guillen's vehicle searched the trunk and found three aliens concealed inside it. That search, however, was conducted only after the officers had first discovered two illegal aliens in the passenger compartment. The search of the vehicle's trunk therefore rests upon traditional probable cause and is not separately in issue here. The court of appeals assumed for purposes of its decision that the "discovery [of the aliens in the passenger area] gave probable cause to search the trunk" (Pet. App. 7a, n. 3). The court found it unnecessary to decide the issue, "because the parties rest their cases on the validity vel non of the stop made under the inspection warrant" (*id.* at 4a, n. 1).

precepts of the Fourth Amendment" (Pet. App. 24a). The warrant was invalid, the court found, because it was not issued on the basis of "probable cause—or even founded suspicion—focused on any particular person or vehicle" (*id.* at 32a), and because it did not describe with sufficient particularity the persons or things to be seized (see *ibid.*).

We submit that the prior judicial approval of the San Clemente stop and inquiry procedure is entitled to substantial weight in determining the reasonableness of the stops in this case. That is so, we believe, even if, contrary to the stated views of the five Justices in *Almeida-Sanchez,* the checkpoint warrant is incompatible with the terms of the Fourth Amendment's warrant clause.

1. Although the warrant was not issued on the basis of probable cause focused on any particular person or vehicle, the affidavits and other information supporting the government's application satisfied the magistrate that there was "probable cause to believe that mass violations of the Immigration laws * * * have been and are being committed" at the location of the San Clemente checkpoint (A. 52).

For the reasons stated in Mr. Justice Powell's concurring opinion in *Almeida-Sanchez,* that finding satisfied the probable cause requirement of the Fourth Amendment, in light of the unique immigration law enforcement problems faced by the Border Patrol in the Mexican border area. The situation here is analogous to that in *Camara* v. *Municipal Court,* 387 U.S. 523. The Border Patrol's decision to conduct a stop and inquiry procedure at a traffic checkpoint,

like the agency's decision to conduct area-wide housing inspections in *Camara,* "is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular [vehicle]" (387 U.S. at 536).

The court of appeals reasoned that *Camara* is distinguishable from this case "in just two crucial respects" (Pet. App. 25a). First, whereas the periodic building inspections in *Camara* were "the only way to discover certain dilapidations that violated the housing codes, * * * the influx of illegal aliens could conceivably be stemmed in various ways" other than stopping vehicles at checkpoints (*ibid.*). Second, "the inspection[s] authorized in *Camara* were not in the nature of a criminal investigation" (*id.* at 27a), whereas "[t]he checkpoints perform primarily crime-investigative rather than administrative functions" (*id.* at 29a).

Neither of these asserted distinctions is persuasive. As Mr. Justice Powell and the dissenting Justices in *Almeida-Sanchez* recognized (413 U.S. at 278, 279, 293), and as we have argued here (pp. 26–28, *supra*), there is no reasonably practicable alternative to the Border Patrol's traffic checking procedures. Moreover, although the illegal entry and transportation of aliens may involve several criminal offenses,[15] the Border

[15] *E.g.*, 8 U.S.C. 1324 (harboring, transporting, inducing illegal entry); 8 U.S.C. 1325 (illegal entry); 8 U.S.C. 1326 (reentry of deported or excluded alien); 18 U.S.C. 911 (false representation as citizen); 18 U.S.C. 1546 (misuse of visas, permits, and other entry documents). See generally 2 Gordon and Rosenfield, *Immigration Law and Procedure*, §§ 9.22–9.40 (1975).

Patrol's primary mission has always been to prevent unlawful entries and to apprehend illegal entrants for deportation. "Of the approximately half million illegal aliens apprehended in fiscal 1973, virtually none were prosecuted, unless they presented counterfeit or altered documents or aided in smuggling endeavors" (*United States* v. *Baca, supra,* 368 F. Supp. at 408). As Mr. Justice Powell stated, "[t]he possibility of prosecution does not distinguish [roving patrol] searches from those involved in *Camara*"; "violators of the housing code there were [similarly] subject to criminal penalties" (413 U.S. at 278–279). See *Camara* v. *Municipal Court, supra,* 387 U.S. at 527, n. 2.

It is true that a *Camara*-type warrant, "normally * * * sought only after entry is refused," ordinarily "specif[ies] the property to be searched" (387 U.S. at 539), whereas the warrant here authorized the stopping of any northbound vehicle at the San Clemente checkpoint. It is equally true, however, that, "while a building inspector who is refused admission to a building may easily obtain a warrant to search that building, a member of the Border Patrol has no such opportunity when he is refused permission to inspect an automobile" (*Almeida-Sanchez* v. *United States,* 413 U.S. at 282–283, Mr. Justice Powell concurring). If there is to be any advance judicial approval, it must relate to the basic agency decision to operate a particular checkpoint.

The focus of a warrant authorizing checkpoint stops is therefore unavoidably "less precise than that di-

rected against more conventional types of crime" (*United States* v. *United States District Court, supra,* 407 U.S. at 322). In these unique circumstances, the warrant is sufficiently precise if it identifies the place at which the stops are to be made, the permissible purpose and scope of the authorized intrusion, and (with all the particularity that the situation permits) the class of vehicles that may be stopped. The warrant in this case was adequate under that standard.

Five Justices have already expressed the view that a warrant authorizing routine roving patrol searches of all cars in a prescribed area can properly issue on the basis of area-type probable cause. If so, the warrant here, authorizing a far less substantial invasion limited to a particular fixed location rather than an area encompassing several roads, is *a fortiori* valid.

2. Even if a warrant authorizing checkpoint stops could not be brought within the traditional requirements of a search warrant, that would not diminish the significance of the prior judicial approval in determining the validity of the stops in this case. As we have stated (pp. 16–17, *supra*), the proper analysis here involves application of the reasonableness standard of the Fourth Amendment, and the question is whether, in light of the advance judicial approval of the checkpoint operations, the investigative stops in this case were reasonable.

Even if the magistrate's approval cannot properly be labeled a "warrant," it satisfies the concern expressed in Mr. Justice Powell's concurring opinion in *Almeida-Sanchez*. What is important in this case is

that the "delicate question of constitutional judgment" involved in "a balancing of the legitimate interests of law enforcement with protected Fourth Amendment rights" was here "resolved by the Judiciary rather than the Executive" (413 U.S. at 284). It is not the warrant itself that assures the reasonableness of an official intrusion; it is the "prior judicial judgment" (*United States* v. *United States District Court, supra,* 407 U.S. at 317) evidenced by the warrant. Accordingly, even if checkpoint stops would be unreasonable without advance approval by a detached and neutral magistrate, no such defect invalidates the stops in this case.

B. THE MAGISTRATE CORRECTLY DETERMINED THAT THE STOP AND INQUIRY PROCEDURE AT THE SAN CLEMENTE CHECKPOINT WOULD BE REASONABLE IN LIGHT OF THE GOVERNMENTAL NEED AND THE LIMITED SCOPE OF THE INTRUSION CONTEMPLATED

1. The San Clemente checkpoint, located on Interstate Route 5 about 62 air miles and 66 road miles from the Mexican border, "is the primary, or cornerstone, checkpoint maintained by the Border Patrol" in southern California (*United States* v. *Baca, supra,* 368 F. Supp. at 410). Deputy Chief Patrol Agent Batchelor testified in the *Baca* hearing (*Baca* Tr. 148):

> Our primary checkpoint is here at San Clemente. This is the crucial one, the critical one. * * * Rather than trying to circumvent that checkpoint, [the alien smugglers] would rather wait until it is broken down, because it is such a straight shot in. That is where we try to hold as firm as we can.

Together with the other checkpoints in the area, San Clemente forms a strategic network in which "each checkpoint relates to all others in such a manner as to preclude evasion by the use of bypass roads" (*Baca, supra,* 368 F. Supp. at 416).

The San Clemente checkpoint is placed where "the volume of traffic is the lowest of any point on Route 5 between San Diego and Los Angeles" (*id.* at 411). "While there is a great deal of commuter traffic south of Oceanside, the traffic at the Interstate 5 checkpoint is predominantly inter-city with few commuter vehicles passing through" (*ibid.*). "Bounded on the east by Camp Pendleton and on the west by the Pacific Ocean, the checkpoint straddles a natural corridor along which illegal aliens frequently travel in their migration towards the labor markets in the north" (*id.* at 415).[16]

[16] The district court in *Baca* described the appearance of the checkpoint as follows (368 F. Supp. at 410–411):

"Approximately one mile south of the checkpoint is a large black on yellow sign with flashing yellow lights over the highway stating 'All vehicles, Stop Ahead, 1 Mile.' Three-quarters of a mile further north are two black on yellow signs suspended over the highway with flashing lights stating 'Watch For Brake Lights.' At the checkpoint, which is also the location of a State of California weighing station, are two large signs with flashing red lights suspended over the highway. These signs each state 'Stop Here—U.S. Officers'. Placed on the highway are a number of orange traffic cones funneling traffic into two lanes where a Border Patrol agent in full dress uniform, standing behind a white on red 'Stop' sign checks traffic. Blocking traffic in the unused lanes are official U.S. Border Patrol vehicles with flashing red lights. In addition, there is a permanent building which houses the Border Patrol office and temporary detention facilities. There are also floodlights for nighttime operation."

Traffic checking operations at San Clemente are very productive. An affidavit supporting the warrant application stated that nearly 17,000 aliens were apprehended at the checkpoint in calendar year 1973 (A. 46). That figure, though significant, is not by itself a full measure of the effectiveness of the checkpoint, for its principal purpose is to *deter* illegal entry (see *Baca,* 368 F. Supp. at 407). The credibility of a deterrent cannot be assessed solely by reference to the number of violators apprehended; the more effective it is, the less productive it is likely to be.

The Border Patrol's experience in operating the San Clemente checkpoint unexpectedly [17] or over unusually

[17] Some smugglers know that the heavy volume of traffic on Interstate Route 5 on Sunday afternoons usually makes it impractical to operate the San Clemente checkpoint at that time. On one such Sunday afternoon, however, additional manpower was deployed at San Clemente, and the checkpoint was kept open. As Agent Batchelor testified, the results were impressive (*Baca* Tr. 156):

"We made—seized twenty-one smuggling vehicles with loads at the checkpoint. They just blundered on in, and we had another twenty some odd vehicles abandoned south of the checkpoint. * * * Two days later, we were still rounding up aliens in Camp Pendleton that had left these vehicles and gone into Camp Pendleton."

A total of more than 300 illegal entrants were apprehended as a consequence of the Sunday operation (*id.* at 158).

Similar results were obtained when the San Clemente checkpoint was closed down for a short period and then opened again (*id.* at 408). Scouts had notified smugglers that it was safe to proceed north on Interstate Route 5, but the checking was resumed while they were en route, and the drivers "had no way of knowing that [the checkpoint] was put up until they reached it" (*ibid.*).

long periods [18] demonstrates that it acts as a powerful deterrent to the inland transportation of illegal entrants. As Judge Carter stated in his dissenting opinion in this case, while many thousands of deportable aliens are apprehended at San Clemente, "the number *deterred* is inestimable" (Pet. App. 41a; emphasis in original).

The operating procedure at San Clemente is unlike that of other checkpoints (see 368 F. Supp. at 406–407, 411). A "point" officer stands on the highway observing approaching vehicles and their occupants. If he determines that a stop and inquiry would be appropriate, he directs the vehicle to a secondary area at the side of the highway, where another officer asks the occupants about their citizenship and immigration status.[19]

[18] Checkpoints cannot ordinarily be operated around-the-clock. On one occasion, however, the San Clemente checkpoint was operated continuously for five days, and smugglers were unable to transport illegal entrants on Route 5. When the "drop houses" began to overflow, some smugglers attempted to take a different, unfamiliar route and found themselves unexpectedly at the coordinate California checkpoint at Oak Grove. "[T]here were seven loads that they sent through Oak Grove and five of those loads were caught at the checkpoint" (*Baca* Tr. 409).

[19] At most checkpoints, traffic is much lighter than at San Clemente, and the stop and inquiry is conducted by the point officer himself. Vehicles are referred to a secondary inspection area only when suspicious circumstances warrant further questioning of the occupants or a physical inspection of the vehicle. See *United States* v. *Baca*, *supra*, 368 F. Supp. at 406–407, 411–414. For descriptions of two Border Patrol checkpoints in Texas, see *United States* v. *Hart*, 506 F. 2d 887, 896 (C.A. 5), vacated and remanded, June 30, 1975, No. 74-6014, and *United States* v. *Fuentes*, 379 F. Supp. 1145, 1147 (S.D. Tex.), affirmed, 517 F. 2d 1401 (C.A. 5).

Although many vehicles pass through the checkpoint during its hours of operation,[20] it was estimated at the time of the *Baca* hearing that only three percent were stopped and directed to the secondary area (368 F. Supp. at 411). Statistics compiled subsequently indicate that the figure is less than one-half of one percent (see Pet. App. 63a). Even though vehicles that are stopped must leave the highway and enter the secondary area, the average time consumed by a stop for questioning at San Clemente is still only three to five minutes (A. 46).

Thus, not only is the San Clemente checkpoint an integral and effective part of the network of checkpoints in the southern California area, but also it is located and operated in a manner reasonably designed to minimize disruption of and inconvenience to the innocent traveling public. The magistrate's determination that a warrant should properly issue to authorize a stop and inquiry procedure at the checkpoint was amply supported by the affidavits before him, together with the evidence and findings in *Baca*.

The determination that there was "probable cause to believe that mass violations of the Immigration laws" were being committed at the location of the checkpoint (A. 52) was borne out by statistics submitted in the return on the warrant (A. 54). They showed that, during the ten-day period covered by the warrant, the checkpoint was operated for about 124 hours, during which 145,960 vehicles passed through

[20] The checkpoint is operated around-the-clock except in times of heavy traffic, adverse weather conditions, or manpower shortages (A. 47; 368 F. Supp. at 411, 415).

the checkpoint. Only 820 of those vehicles (or about one-half of one percent) were stopped for questioning, and 725 deportable aliens were found in 171 (or about 21 percent) of the vehicles stopped.

2. The court of appeals, however, concluded that the government's showing was not sufficient to justify issuance of the warrant (Pet App. 33a–35a). The reasons given by the court do not support its conclusion.

The court stated that "the frequency with which illegal aliens pass through the San Clemente checkpoint is far too low," because "only 0.12 percent of the passing cars were found to contain 'illegal' aliens" (*id.* at 33a). That figure was computed by dividing the number of vehicles in which aliens were found by the total number that passed the checkpoint (more than 99 percent of which were not stopped for questioning).

The resulting percentage does not meaningfully reflect "the frequency with which aliens illegally in the country are known or reasonably believed to be transported" in the area (*Almeida-Sanchez* v. *United States, supra,* 413 U.S. at 283, Mr. Justice Powell concurring), because there is no assurance that every vehicle containing illegal entrants was successfully stopped by the officers at the checkpoint. It is reasonable to suppose that, of the many thousands of vehicles not stopped at the checkpoint, a significant proportion (presumably less than the 21 percent figure) in fact contained aliens who successfully evaded detection.

The Border Patrol has never claimed that it has the capacity to detect and apprehend, through a stop and inquiry procedure, every deportable alien who passes a checkpoint. Its objective is to deter the illegal entry

and transportation of aliens by subjecting each (and those who unlawfully transport them) to a significant risk of apprehension through traffic checking procedures. Statistics at San Clemente demonstrate that the operation is reasonably successful but obviously not impenetrable. They also confirm the magistrate's finding that an enormous number of violators pass through the checkpoint. The court of appeals' arithmetic does not contradict or in any way undermine that finding.

The court of appeals also concluded that "66 miles is too far away" from the border (Pet. App. 33a) and that the checkpoint lacks "an essential nexus with the border" (*id.* at 34a). As the record in *Baca* demonstrates, however, geographic considerations and the fraudulent use of border-crossing identification cards make it necessary to place most checkpoints, including the San Clemente checkpoint, at least 25 miles from the border (*e.g., Baca* Tr. 32–33, 115, 166–167, 353; 368 F. Supp. at 406)[21].

Professional smugglers commonly furnish their illegal entrants with illicit border-crossing cards by which to enter at a regular port of entry (see *Baca* Tr. 404–405). Since those cards authorize the holder to travel up to 25 miles from the border, a checkpoint placed within that range would be ineffective in

[21] Under 8 C.F.R. 212.6, a Mexican nonresident alien may enter this country as a nonimmigrant visitor pursuant to a border-crossing card, Form I-186, which authorizes the holder to spend a maximum of 72 hours in the United States. The visit must be confined, however, to the "immediate border area," which is defined by the regulation as "within a distance of 25 miles from the Mexican border."

deterring the inland movement of the illegal entrant. Documentation authorizing travel beyond the 25-mile limit, however, is far more difficult for a smuggler to obtain (*id.* at 420–421).

As Chief Patrol Agent Felchlin testified, "[s]trategically, the traffic check operations are located at the first possible location where we can effectively control the traffic" (*id.* at 353).

Moreover, the immediate border area to the south of the San Clemente checkpoint is unsuitable for traffic control operations because there are too many roads to cover effectively and because such operations would disrupt commuter and shopper traffic. Agent Batchelor testified that if checkpoints in the Chula Vista sector were placed within a mile or two from the border, "it would be havoc" (*id.* at 162). "The normal business of this metropolitan area here [San Diego] could not be conducted" (*ibid.*). Even if checkpoints were placed five miles from the border in that area, it would require twelve stations to do the job accomplished now by three and would still require the checking of far more traffic, including "bumper to bumper" commuter traffic, than is checked at existing stations (*id.* at 162–163). The San Clemente checkpoint is located at a portion of Interstate Route 5 that carries few commuter vehicles, and where the volume of traffic is the lowest of any point between Los Angeles and San Diego (368 F. Supp. at 411).

Natural geographic barriers "act to funnel all northerly traffic" (*id.* at 410) along routes where the Border Patrol operates its three principal checkpoints

in the Chula Vista sector of southern California. The majority of the traffic follows Interstate 5 and passes through the San Clemente checkpoint, which is bounded by a narrow strip of land dropping off to the Pacific Ocean on the west and Camp Pendleton on the east. The checkpoint thus "straddles a natural corridor along which illegal aliens frequently travel" (*id.* at 415).

Thus, while the checkpoint is 66 miles from the border, its location is dictated by geographic and strategic considerations. It is as close to the border as feasible in light of those considerations. The checkpoint's distance from the border, though relevant, is not, in these circumstances, of controlling significance in determining the reasonableness of its operation.

Finally, the court of appeals stated that the "degree of interference with the rights of innocent persons at the checkpoint is intolerable," because "[r]oughly 999 out of every 1000 cars passing the checkpoint carry only persons who are lawfully within the country" (Pet. App. 34a). "We cannot countenance the cumulative intrusion of stopping ten million cars per year where only one out of every 1000 passing cars may contain aliens" (*id.* at 34a–35a).

The court's analysis rests upon erroneous premises. First, while 10 million vehicles may pass the checkpoint annually, less than half that number passes while the checkpoint is in operation.[22] Second, as we have

[22] During the nine-month period when the checkpoint was operating under warrants, approximately three million vehicles passed during its hours of operation (Pet. App. 63a).

already indicated (p. 54, *supra*), it is inaccurate to say that "only one out of every 1000 passing cars may contain aliens." Though it is impossible to estimate the number of vehicles containing aliens that successfully evade detection, the figure is undoubtedly substantial.

Third, the record here indicates that only about one-half of one percent of the passing vehicles are stopped for inquiry (A. 54). The rest are waved through the checkpoint, usually without stopping at all.[23] But even if most vehicles are brought to a momentary halt, the occupants are not questioned by the point officer, and the resulting "intrusion," if any there be, is of little constitutional significance. The Ninth Circuit itself has held that the mere "diversion of motor traffic into a zone where it can be observed by officers" does not infringe upon "any constitutionally protected expectation of privacy" (*United States* v. *Evans*, 507 F. 2d 879, 880, certiorari denied, June 30, 1975, No. 74-6055).

The pertinent inquiry, as Judge Carter stated in his dissenting opinion (Pet. App. 40a), is whether it is reasonable to stop *for questioning* a very small proportion of the passing vehicles, when about 20 percent of the vehicles stopped for questioning are found

[23] The evidence in *Baca* does not clearly indicate how many vehicles are brought to an initial stop (see *Baca* Tr. 184–185). The district court stated that "[t]he checkpoint entails for the average motorist nothing more than a fleeting stop" (368 F. Supp. at 415). As we stated in the oral argument in *Ortiz* (Tr. 25–26), the Border Patrol has informed us that, apart from those vehicles that are referred to the secondary area for questioning, very few come to a full stop (except when traffic is light and the driver is curious). The "point" officer waves the traffic through at about five miles an hour.

to contain deportable aliens. Given the important law enforcement interest served by that procedure, and the brief and limited intrusion it entails, we think it is plainly justified. To characterize the statistics as showing that "the border patrol was 'overzealous' by a factor of nearly five in diverting cars for secondary inspection" (Pet. App. 13a) is to acknowledge, in effect, that the stop and inquiry procedure under the warrant in this case was remarkably successful at only a minimal cost to innocent travelers.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded with directions to enter judgments affirming the conviction of respondent Martinez-Fuerte and remanding the other cases to the district court for further proceedings.

Respectfully submitted.

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DECEMBER 1975.

APPENDIX

In the United States District Court for the District of Arizona

CR–74–758–TUC WCE (Battin)

UNITED STATES OF AMERICA, PLAINTIFF
v.
CHARLES THOMAS OSBORNE, SR., DEFENDANT

ORDER

Presently pending in this action is the motion of the defendant to suppress any and all evidence seized as a result of the detention and arrest of defendant on November 11, 1974. Hearings were conducted on January 13 and January 20, 1975.

For the purposes of this motion only, the Court makes the following summary of facts surrounding the seizure of the evidence in question.

At approximately 11:45 o'clock a.m., November 11, 1974, Supervisory Customs Patrol Officer J. C. Padalino observed a 1969 white over red Ford Galaxie traveling north at Milepost 2, approximately two miles north of the United States-Mexico International Boundary. The defendant was the driver of the vehicle. Officer Padalino noticed that the car was riding low, despite the fact that it appeared to have heavy duty "air shocks".[1] The vehicle did not have a trailer

[1] The court concludes that the evidence introduced by defendant at the above hearings was insufficient to establish that the subject vehicle was not riding low on the day in question or that Officer Padalino could not on that day observe a portion of the heavy duty air shocks.

hitch. Padalino also observed what appeared to be fingerprint smudges on the vehicle's trunk.

Through a radio check, Padalino discovered that the vehicle was registered to Richard R. or M. E. Quiroz, of Kearny, Arizona. Kearny is some one hundred miles north of the International Boundary. Officer Padalino noted that the name "Quiroz" is of Mexican or Spanish origin, while the driver of the subject vehicle appeared to be of Anglo-American origin.

While awaiting the results of the registration check, Padalino observed that the defendant displayed numerous nervous characteristics. The vehicle, which was first observed traveling at approximately the posted speed limit of fifty-five miles per hour, slowed down to a speed of forty miles per hour. When Padalino followed the subject vehicle, the defendant repeatedly looked through his rear view mirror. His vehicle swerved on the roadway. When Padalino would drive his vehicle in the lane adjacent to the defendant's vehicle, the defendant would not look at Padalino or Padalino's marked Patrol vehicle. Padalino noted that the defendant sat very rigid in the driver's seat, maintaining a firm grip on the steering wheel with one hand, while moving his other hand nervously.

Because of these circumstances, Padalino stopped the defendant's vehicle at approximately Milepost 10 on Interstate 19. Both defendant and Padalino exited their vehicles and approached each other. Upon request, the defendant produced his driver's license showing that his name was Charles Thomas Osborne and that his address was 1254 South Craycroft, Tucson, Arizona. The defendant again projected indicia of nervousness by moving his arms and head in a noticeably fast fashion while talking with the officer.

The defendant said that he had not been in Mexico. He further indicated to Padalino that the vehicle belonged to a Robert Serrano of Nogales, Arizona, although the defendant said he did not have the vehicle's registration. The defendant said that he had been at a friend's house in Nogales, Arizona, and identified that friend as Robert Serrano. In response to further questioning, the defendant described the directions to the Serrano house, but these directions made no sense to Padalino, who had lived and worked in Nogales, Arizona, for three years.

Officer Padalino then approached the vehicle's driver's door where he detected a strong odor of marihuana emanating from an open window. Padalino detected the same odor emanating from the trunk area.

Padalino requested that the defendant open the trunk. The defendant declined, saying that he did not have a trunk key. Padalino then read the defendant his *Miranda* rights and told the defendant that he, Padalino, suspected that there was marihuana in the vehicle. Ultimately, some three hundred five pounds of marihuana were recovered from the vehicle's trunk.

The Court concludes that the above factual summary presents circumstances sufficient for Officer Padalino to have a founded suspicion that criminal activity was afoot. The stopping of defendant's vehicle and the detention of the defendant were therefore justified. The Court further concludes that the circumstances, taken in their entirety, presented Officer Padalino with probable cause to conclude that the defendant had committed or was committing a felony. The arrest was therefore justified. The evidence seized as a result of that arrest was not tainted.

It is therefore ordered that defendant's motion to suppress be denied.

Done and dated this 21st day of January, 1975.

JAMES F. BATTIN,
U.S. District Judge.

(Do Not Publish)

United States Court of Appeals for the Ninth Circuit

No. 75–1595

UNITED STATES OF AMERICA, APPELLEE

v.

CHARLES THOMAS OSBORNE, SR., APPELLANT

MEMORANDUM

(July 3, 1975)

Appeal from the United States District Court
for the District of Arizona

Before: Ely, Hufstedler, Circuit Judges, and Fitzgerald,[1] District Judge.

The facts are too thin to sustain founded suspicion. On remand, the indictment will be dismissed.

---

[1] The Honorable James M. Fitzgerald, United States District Judge, District of Alaska, sitting by designation.

(Do Not Publish)

United States Court of Appeals for the Ninth Circuit

No. 75–1332

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SHARON DIANE MOREY, DEFENDANT-APPELLANT

MEMORANDUM

(June 10, 1975)

Appeal from the United States District Court for the District of Arizona

---

Before: Browning, Ely, and Carter, Circuit Judges.

1. There was ample justification for the stop. Appellant slowed down perceptibly as the Customs officers passed in their marked patrol car. The rear of her automobile was riding low, although it was equipped with overload shock absorbers. Her car swerved slightly from side to side "like she was nervous or . . . excited about something." There were handprints on the trunk. A vehicle registration check revealed that the automobile was owned by a person living on East Street in Nogales, Arizona, a notorious smuggling area. Appellant appeared to be Caucasian, but to the officers' knowledge no Caucasians resided in the East Street area.

The district court was not required to reject the officers' testimony because the shock absorbers could not be seen in the photographs introduced by appellant and the rear of the car dropped only slightly when loaded and standing still. The view of the car depicted in the photograph introduced by the government is substantially the same as that presented to the Customs

officers as they followed appellant's automobile, and the shock absorbers are clearly visible. The court could reasonably conclude that the overloaded condition would have been more apparent when the car was moving at highway speeds than when photographed standing still.

2. The record does not support appellant's contention that there were such substantial contradictions between the testimony at trial and at the suppression hearing that the district court erred in denying appellant's renewed motion for suppression without a further hearing.

The alleged inconsistencies with respect to the trunk keys and the time at which the handprints on the trunk were noticed were not argued to the district court. They may not be relied on here in support of the argument that the district court should have granted a new evidentiary hearing on the suppression issue. There was no inconsistency in the testimony regarding the officers' location when they first observed appellant's automobile. Officer Gutierrez adequately explained the alleged inconsistencies with respect to whether the officers had prior information regarding appellant's automobile, whether Gutierrez in fact smelled marihuana at the time of the stop, and the location of the officer's patrol car when they observed the overload shock absorbers on appellant's automobile. The testimony was inconsistent only with respect to the distance the officers followed appellant, the exact location of the stop, and whether appellant appeared to be nervous.

Appellant did not request the trial court to hold a new hearing on the suppression issue. The trial court was asked to consider the suppression issue de novo, and did so. All of the relevant evidence was before the

trial court. Appellant argued the alleged and actual inconsistencies to the court, and the court considered them in denying the motion. Determining the credibility of the officers and weighing the evidence was peculiarly the function of the trial judge. His resolution of the suppression issue was not clearly wrong.

3. Appellant's first admission of the theft of the automobile was made in response to routine questioning as to the ownership of the car, conducted immediately after the stop and before appellant was taken into custody. It was not error to admit it, even though it was made prior to the *Miranda* warning. *See Lowe v. United States,* 407 F. 2d 1391 (9th Cir. 1969).

4. It was not error to give the instruction approved in *United States* v. *Castillo-Burgos,* 501 F. 2d 217, 218–19 (9th Cir. 1974). It was enough that the car was "contraband-laden," i.e., that the contraband was in or attached to the automobile; it was not necessary that the contraband be concealed within the body of the car. *Id.* at 219. *See also United States v. Campbell,* 507 F. 2d 955, 957 (9th Cir. 1974). *And see especially United States v. Martinez,* —F. 2d — (9th Cir. Feb. 28, 1975) (Slip Op. at 6).

The court did not err in failing to specifically advise the jury that they must disbelieve the possibility that the automobile was in fact a stolen car of which appellant had no prior knowledge before they could accept the inference of guilty knowledge. It is doubtful that such an instruction would be required (*United States* v. *Castillo-Burgos, supra,* 501 F. 2d at 219); in any event, it was not requested.

5. The evidence of knowing possession was sufficient. Appellant was the driver and sole occupant of an automobile that had 198 pounds of marihuana in its

trunk. *See United States* v. *Martinez, supra* (Slip Op. at 4–7); *United States* v. *Dixon,* 460 F. 2d 309 (9th Cir. 1972); *United States* v. *Asconlani-Gonzales,* 449 F. 2d 159 (9th Cir. 1971).

Affirmed.

U.S. GOVERNMENT PRINTING OFFICE, 1978

Supreme Court, U. S.
FILED
JAN 7 1976
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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 74-1560

UNITED STATES OF AMERICA,
Petitioner,

v.

AMADO MARTINEZ-FUERTE, *et. al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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IN THE

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OCTOBER TERM, 1975

No. 74-1560

UNITED STATES OF AMERICA,

Petitioner,

v.

AMADO MARTINEZ-FUERTE, *et al.*,

Respondents.

ERRATA

The following errata have been discovered in the brief for respondents with this Court on 14 January 1976:

Page 3 Lines 27-30 – should read: "The appendices referred to include affidavits by Border Patrolmen, *an* Assistant United States Attorney, and statistical tables concerning the results of alleged *checkpoint* stop and interrogation practice."

Page 8 Footnote 5 – should read as follows: "Petitioner *has* filed copies of its briefs . . . ."

Page 20 Lines 1-3 – should read as follows: "The officers did not have reason to believe that respondents had crossed the border, been in contact with anyone that has, or *had* aliens in their vehicles."

Page 33 Footnote 14 – should read as follows: "The new United States Attorney for the Southern District of California recently announced a new enforcement program to prosecute employers of illegal aliens who withhold income tax and social security contributions from their alien employees' pay *and do not remit these sums to the government. Los Angeles Times*, November 6, 1975, p. K1"

Page 51 Footnote 31, Lines 5-9 – should read as follows: "The premise here is that any intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity. [citations omitted]. *The second* distinct objective is that those searches deemed necessary should be as limited as possible."

Page 55 Lines 4-7 – should read as follows: "While Paxton's Writ was directed exclusively toward the discovery of undutied goods *in* the Port of Boston, the warrant of inspection seeks to discovery all violations of Title 8 of the United States Code (A-52)."

Page 55 Footnote 34, Lines 7-12 – should read as follows: "If general search warrants based on less than probable cause are to become the basis for official searches in such a *wide* area, it would not be too bold to suggest that we have come a little way from *Entick v. Carrington*, 19 Howell St. Tr. 1029, 1063 (1765) (overturning a 'ridiculous warrant against the whole English nation')."

Page 65 Lines 3-9 – should read as follows: "Since all of the aliens located in a vehicle driven by an accused smuggler must be incarcerated to provide the defendant an opportunity to examine them for possible exculpatory evidence, this unique complaint procedure allows *an* accused to plead guilty to a misdemeanor and

for the prompt release of the alien witnesses to Mexico."

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 74-1560

UNITED STATES OF AMERICA,
Petitioner,

v.

AMADO MARTINEZ-FUERTE, *et. al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

1. Whether this Court's decision in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), which held that traditional notions of reasonable suspicion applied to roving immigration stops of automobiles for the purpose of interrogating the occupants as to their right to be in the United States, applies to causeless, discretionary Border Patrol stops of automobiles at the fixed checkpoint at San Clemente, California.

2. Whether the "warrant of inspection" issued by a United States Magistrate, if necessary to allow checkpoint stops and interrogations at fixed checkpoints, is constitutional to permit a permanent roadblock on a busy interstate highway sixty-six miles from the border where approximately one out of a thousand cars passing has persons without proper immigration documentation.

STATEMENT OF THE CASE

With the petitioner's statement of facts as it relates to the trials in the three cases before the Court, respondents have no quarrel (Brief for Pet. 2-10). However, with respect to petitioner's assertion that the record and opinion in *United States v. Baca, et al.*, 368 F.Supp. 398 (S.D. Cal. 1973) [hereinafter cited as *Baca*] is part of the record in these cases, respondents disagree. As reflected in the record below, counsel for respondent Martinez-Fuerte objected to the use of any materials being placed in the record which were extraneous to the materials before the trial court or the magistrate who issued the "inspection warrant:"

> Mr. Sevilla: I think that the warrant itself, and the affidavits, which were before the Magistrate when he issued the inspection warrant should be filed with the Court. I would object to any material that is extraneous to what materials the Magistrate had before him when he issued this inspection warrant, because the warrant is going to rise or fall based upon the materials that were before the Magistrate at the time he issued it; and, so, that would probably take into account any responsive affidavits or returns, and I would object to those being entered.

> The Court: Your objection is noted. They will be filed for whatever –
> Mr. Sevilla: Also, then –
> The Court: – purpose they may serve. (A. 26-27)

None of the respondents' cases were consolidated with the *Baca* case for the consolidated hearing. Nor did the magistrate who issued the "inspection warrant" rely on the entire *Baca* record. The latter merely read one agent's testimony in that case which had been incorporated by reference by an affiant to the warrant (A. 52). The issue of what is of record and what may be properly cited as such is one of such magnitude as to warrant expanded discussion prior to argument of the merits of this case.

In its petition to this Court, petitioner included as appendices (pages 48a-63a) applications for an "inspection warrant" *after* the decision by the Ninth Circuit in this case. The denials of the applications by District Judge Turrentine and Senior Circuit Judge Carter are also appended. These materials were not of record in these cases, and we moved to strike them from the Solicitor's petition, which motion was denied by this Court on 6 October 1975. These materials are now relied upon by petitioner to support arguments about subsequent San Clemente checkpoint activity (Brief for Pet. 21). The appendices referred to include affidavits by Border Patrolmen, as Assistant United States Attorney, and statistical tables concerning the results of alleged checkpoints stop and interrogation practice. None of this material was ever presented to the district courts involved in respondents' cases, nor to the circuit court which decided respondents' cases. The Clerk of the Court of the Ninth Circuit has not certified these

documents as part of the respondents' record pursuant to Rule 21 of the Rules of this Court. Counsel for the respondents read these *ex parte* affidavits and statistical charts for the first time in the Solicitor General's petition for *certiorari*. The documents are entirely the product of the *ex parte* activity of the United States Attorney's Office in San Diego and local Border Patrol Agents. They were never produced as part of an adversary hearing, much less a part of respondents' cases.[1]

Respondents' objections to the *ex parte* materials in the Solicitor General's brief rest not only upon the

[1] In *McClellan v. Carland*, 217 U.S. 268, 282-283 (1901), this Court refused to consider affidavits supplied by a district court judge with respect to proceedings the judge believed relevant for a decision properly to be made by this Court. This Court refused to consider these materials "because they are not in the record, as the same has been certified to us from the Circuit Court of Appeals as the one upon which it acted, . . ." In *Lawn v. United States*, 355 U.S. 339, 354 (1957), the Government attempted to file a transcript with this Court of a hearing accorded to Lawn in order to verify a point disputed in that litigation. This Court responded as follows: "Lawn has moved to strike that transcript and the portions of the Government's brief relating thereto. That motion must be sustained as we must look only to the certified record in deciding questions presented. *McClellan v. Carland*, 217 U.S. 268." *See also Ciucci v. Illinois*, 356 U.S. 571, 573 (1957) where this Court stated: "[T]his material, not being part of the record, and not having been considered by the state courts, may not be considered here." It is well established that in order to establish facts, a reviewing court will not consider or refer to affidavits and assertions *dehors* the record. A reviewing court is not a fact-finding court and must necessarily render its decisions on the evidence and record before it. It cannot receive new evidence. We have moved, by separate motion, to strike such references from the petitioner's brief.

procedural unfairness of one party attempting to buttress its position through *ex parte* affidavits and statistics, but also because the Border Patrol has refused[2] the efforts of present counsel to verify the manner in which these statistical compilations were taken at the San Clemente checkpoint.

The product of the procedural unfairness and contravention of the rules of this Court is exacerbated where the *ex parte* affidavits and statistics are completely within the control of one party, the petitioner, to the litigation. This is especially true in light of the tendency of law enforcement agents to report to the courts that which is necessary to achieve

[2] Attached to our motion to strike these portions of the petitioner's petition, we detailed the efforts made by the office of counsel for the respondents during the operation of the checkpoint to send investigative personnel to the San Clemente checkpoint to simply watch its operation. Permission was refused by the Border Patrol (see letter to John J. Cleary, Executive Director of Federal Defenders of San Diego, Inc. from Richard E. Batchelor, Deputy Chief Patrol Agent assigned to the Chula Vista sector of the United States Border Patrol, attached as Exhibit A to the motion to strike). An effort was made in a later case involving a warrant of inspection to gain a district court order allowing Federal Defender investigators to watch the activity at the San Clemente checkpoint. The district court denied the motion and a writ of mandamus to the circuit court of appeals was denied shortly after the decision in *United States v. Martinez-Fuerte*, 514 F.2d 308 (9th Cir. 1975). See *United States v. Edward Windsor Wise*, Order Denying Mandamus Petition, No. 75-1159 (9th Cir. March 12, 1975).

law enforcement ends.[3] Respondents are unaware of any regulation which exempts the Solicitor General from the rules of appellate procedure binding upon other counsel.

In addition to such citations to authority outside the record, the petitioner repeatedly refers to unidentified hearsay informants in the Immigration and Naturalization Service (hereinafter cited as INS) who "inform" the petitioner, for example, that the price charged aliens to be smuggled has declined recently (Brief for

[3] Judge Hufstedler of the Ninth Circuit has noted the "curious and even suspicious" change of Border Patrol testimony after *Almeida-Sanchez* concerning the propensity of motorists to "consent" to the search of their trunks:

> Is it not curious and even suspicious that since the Supreme Court's decision in *Almeida-Sanchez v. United States* (1973) 413 U.S. 266, so many motorists stopped by officers near the border voluntarily relinquish their trunk keys or open their trunks at the mere suggestion of the officer? The amount of cooperation is remarkable since the cases that reach this court involve motorists who had good reason to keep their trunk locked. *United States v. Hernandez-Martinez*, Slip 3, no. 3, No. 74-3327 (9th Cir. Sept. 30, 1975) (Hufstedler dissenting).

Pet. 25),[4] or that the time for a stop and questioning at a checkpoint ordinarily takes no more than five seconds per occupant (*Id.* at 28-29). (Cf. Brief for Pet. 53: "the average time consumed by a stop for questioning at San Clemente is still only three to five minutes"). These allegations are not only outside this, or any, record but the alleged source of the information within the INS is unidentified.

A product of petitioner's briefing beyond the record (and relying upon an interested party to this litigation to supply a "record" when needed), was made plain in this Court's opinions in *Brignoni-Ponce* and *Ortiz*, *supra*. The government stated to the Court in its briefs that checkpoints were necessarily placed in excess of twenty-five miles of the border because of "the *widespread* fraudulent use of border-crossing cards

[4] We note that while the person within the INS informs petitioner that the price an alien pays to be smuggled into this nation has allegedly dropped because of the absence of inland checkpoints, INS Commissioner Chapman states in a recent article:

> This influx of illegal aliens appears to be part of a greater migration of persons from the less developed nations of the world to the industrialized countries in search of employment. Waiting periods to legally enter the United States have been extended to several years in some instances, and many persons forsake the long delay and enter by any available means. The desire to enter and remain in the United States is so strong that no risk is too great nor seemingly any price too high to achieve that end. Many aliens pay large sums to smugglers to bring them in. Fees of $200 to $700 are commonplace, and sometimes illegal aliens pay as high as $1,500. Chapman, "A Look at Illegal Immigration Causes and Impact on the United States," 13 *San Diego L. Rev.* 34 (Dec. 1975) [hereinafter cited as Chapman].

[which] make it necessary to place most checkpoints at least twenty-five miles from the border." (Brief for Pet. 8, *United States v. Ortiz*, No. 73-2050) (Emphasis added).[5]

In our respondents' brief in *Ortiz* at 41, we pointed out the inaccuracy of this position quoting INS sources and statistics which confirmed that less than 5% of the arrests at checkpoints were of aliens violating the terms of their documents (*Id.* at 42).

In the present case, petitioner now concedes that, "Only a relatively *small proportion of the deportable aliens* apprehended by the Border Patrol enters this country lawfully and then violate the terms of their entry." (Brief for Pet. 27-28; but cf. 55-56) (Emphasis added).

The Court relied upon the government's original erroneous representation that the border crossing card violators were the major reason for the traffic checking programs far from the border. See *Brignoni-Ponce, supra*, slip opinion at 6. Now the government represents that 96% of the deportable aliens apprehended in fiscal year 1975 entered surreptitiously, i.e., illegally, and that the I-186 card violators arrested as deportable aliens compose only a portion of the 4% balance of apprehensions (Brief for Pet. 28).

The point of this discussion is that if this Court does not hold the petitioner to facts of record, and instead relies upon self-serving comments from petitioner and

[5] Petitioner had filed copies of its briefs in *Ortiz* (No. 73-2050) and *Brignoni-Ponce* (No. 74-114) with respondents in this case and relies on them to describe the problems facing law enforcement near the border. (Brief for Pet. 18). We ask the Court to refer to our respondents' briefs in those cases.

the INS such as "the Border Patrol has informed us" (e.g., Brief for Pet. 58, n.23), the result not only is procedural unfairness to respondents, but also factually erroneous results. One receives the impression when reading the government's brief in this case that its position shifts on identical points depending upon the assumed law enforcement need of the argument. As the above example shows, when the government argues the need for a checkpoint some 66 miles from the border, the alleged border crossing card problem is raised as the *raison d'etre* for the distance from the border (Brief for Pet. 55). But when petitioner is debunking one of the numerous alternative suggestions of the court below that the number of immigration cards issued by INS be curtailed, it explains that such card holders are not the problem. (*Id.* at 28).

SUMMARY OF ARGUMENT

I.

A. In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), this Court held that Border Patrol officers on roving patrol might stop vehicles to inquire about the occupants' citizenship only when the officers are aware of articulable facts warranting a reasonable suspicion that the vehicle may contain illegally immigrated aliens. No facts of constitutional significance exist to distinguish a roving stop for interrogation from one conducted by officers at a checkpoint. All of the considerations which led this Court to rule illegal groundless roving stops of cars by the Border Patrol exist to produce the same conclusion for stops at inland checkpoints which are not the functional equivalent of the border.

The instant cases involve the stop procedure at the San Clemente checkpoint which is located on Interstate 5 some sixty-six miles north of the Mexican-American border. Each year upwards of ten million motorists travel north on this highway which is between California's two largest cities, San Diego and Los Angeles. Their journey is interrupted by the fixed Border Patrol checkpoint located near San Clemente, California. As each motorist reaches the checkpoint, at least one armed Border Patrol officer is standing in the middle of the highway by stop signs halting all traffic. This officer visually inspects the occupants of the vehicle and makes a subjective determination, guided by no statutory or administrative regulation, to refer vehicles off the road for further interrogation. Once referred off the highway, the occupants of the vehicle are subjected to interrogation concerning their right to be in the United States by other armed, uniformed officers. If the officers so elect, the occupants of the car may be ordered to produce documents evidencing their right to be in the United States. At no time prior to any of this activity do the officers have a reasonable suspicion that the occupants of the vehicle may be violating immigration laws. Because the Border Patrol is looking for illegal Mexican alien entrants, the occupants of the vehicle are often referred off the highway because of their apparent Latin-American appearance. In Southern California, there are hundreds of thousands of citizens and lawful residents of Latin-American appearance. The court below found that Border Patrol statistics demonstrate that only approximately one-tenth of one per cent of the automobiles passing through this checkpoint contain deportable aliens. *United States v. Martinez-Fuerte*, 514 F.2d 308, 321

(9th Cir. 1975). For this and other reasons, the court below found the checkpoint "unreasonable under established constitutional standards." (*Id.* at 314).

Just as this Court found in *United States v. Ortiz*, 422 U.S. 891 (1975), that the unfettered discretion of officers at the checkpoint to search cars is an important determinant of the unreasonableness of the checkpoint's operation, the same degree of discretion exists in the instant case for officers to arbitrarily select cars for referral off the highway and interrogation. In *Brignoni-Ponce*, this Court was not convinced that the needs of law enforcement required this degree of interference with lawful traffic, especially in light of the fact that the characteristics of alien smuggling operations tend to generate articulable grounds for identifying violators. "Consequently, a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference. Under the circumstances, and even through the intrusion incident to a stop is modest, we conclude that it is not 'reasonable' under the Fourth Amendment to make such stops on a random basis" (*Id.* at 883).

The same rationale must apply to random checkpoint stops. With skin color a key determinant for suspicion on the part of the officers at the checkpoint, a proper factual basis for checkpoint stop and interrogation procedure is mandatory to prevent disparate treatment of motorists based solely upon the color of a person's skin.

The requirement of reasonable suspicion for checkpoint stops is the "logical, and predictable, next step in the development of search and seizure doctrine under *Almeida-Sanchez v. United States*, 1973, 413 U.S. 26. . . ." *Martinez-Fuerte, supra*, at 314.

B. The petitioner argues that the checkpoint stop operation, conducted on a random basis, is needed to enforce immigration laws. This same government argument was heard by this Court in *Almeida-Sanchez*, *Ortiz*, and *Brignoni-Ponce* with respect to the enforcement procedures involved in those cases. Need alone, of course, cannot sanction otherwise unconstitutional activity. However, the need for the authority to conduct arbitrary, causeless checkpoint stops appears quite dubious in light of the ineffectiveness of the checkpoint in accomplishing its mission of deterring illegal aliens from entering this country. Recognizing the failure of current enforcement techniques, Leonard F. Chapman, Jr., Commissioner of the Immigration and Naturalization Service, has recently written:

> The long term solution to this problem is complex. In the short run, there are two ways the United States can deal with illegal aliens. First, we could build a massive Immigration Service. Perhaps with an army of border patrolmen and several thousand more investigators working in the cities, we might keep out most of the illegals, and eventually sift through the millions of persons in this country to find all those who do not belong here. But that is obviously not only impractical; it is abhorrent to the American conscience. And no one in the Immigration Service advocates such tactics.
>
> I believe that leaves just one practical solution – turn off the magnet that attracts millions of persons to our country. That magnet is the opportunity to obtain employment. Passage of H.R. 8713, the Rodino Bill, would accomplish this by holding the employer liable for employing illegal aliens and subjecting him to penalties if he did so knowingly. *We have had laws on the federal books for many years that call for harsh penalties for illegally entering the United States. They have proved to be an ineffective deterrent to illegal entry*. With the numbers that INS apprehends, it is obviously impractical to prosecute all cases. Our laws call for and illegal aliens do receive due process, which can extend for weeks, months or even years. Most of those we apprehend agree to voluntarily return to their homeland, thereby avoiding prosecution or lengthy formal deportation proceedings. Many come back to this country within days or even hours. (Emphasis supplied) Chapman, "A Look at Illegal Immigration: Causes and Impact on the United States," 13 *San Diego L. Rev.* 34, 39 (December 1975).

Government arguments that checkpoints deter illegal alien entry are undermined by the simple fact that fear of conviction for illegal entry is no deterrent. The fact that many who are detected are not even prosecuted further debilitates such arguments. There exist numerous alternative tools to aid in this law enforcement area. They exist in addition to a constitutional stop procedure – one supported by a reasonable suspicion standard.

II.

A. The warrant of inspection issued by the magistrate in this case offends traditional notions of propriety in the issuance of valid warrants under the Fourth Amendment. Since the warrant is not based upon any allegation of the existence of specific facts which warrant the belief that a specific individual is or has committed a violation of the immigration laws, it suffers from the same major deficiency inherent in the infamous writs of assistance issued by representatives of

the British Crown to enforce the collection of taxes and customs duties, and which led to the inclusion of the Fourth Amendment to the United States Constitution in 1791.

Moreover, because of this lack of individualized reasonable suspicion to believe that a particular vehicle contains immigration law violators, it is the officer at the checkpoint, not the issuing magistrate, who determines whether the intrusion is warranted for a particular vehicle. Thus, the warrant fails to provide the second additional safeguard enumerated by this Court by failing to interpose the mediating judgment of the magistrate between the members of the general public who are subject to the inspection and the officers at the checkpoint who conduct it.

B. The petitioner's proposed analogy to administrative inspection cases is inapplicable and does not justify the emasculation, through the use of a general warrant, of the reasonable suspicion standard for vehicular stops announced in *Brignoni-Ponce*. In *Camara v. Municipal Court*, 387 U.S. 523 (1967), this Court upheld inspection warrants based upon less than probable cause to believe that a particular building was the site of building code violations only because of the peculiar circumstances involved in conducting such administrative inspections. The Court cited a long history of judicial and public acceptance of this type of inspection, the need to inspect in light of the lack of alternatives available, and the limited intrusiveness of the intrusion upon individual privacy owing to its non-personal nature and its administrative, as opposed to criminal, focus.

In the case of area-wide immigration inspection warrants, however, these inspections do not enjoy the

long unbroken history of judicial approval extended to inspections for building code violations. There are many alternatives to causeless vehicular inspections available to the government to stem the tide of illegal immigration. Among these are intensification of the border line watch, restriction of the resident commuter and temporary border pass programs, and the enactment of legislation proscribing the knowing employment of illegal aliens. These are but a few of the many alternative programs which have not yet been tested by the government. Finally, the nature of the checkpoint inspection program is highly personal and the incidence of criminal prosecution is substantial. While the government does not usually choose to prosecute the simple illegal alien entrant, the *Baca* hearings demonstrated that the government does seek to prosecute all drivers of vehicles found to contain aliens.

C. Even if it is assumed that the *Camara*-type analysis is appropriate in the field of area immigration inspections, the warrant now before the Court does not fulfill any of the requirements that Justice Powell enumerated in *Almeida-Sanchez* for the issuance of an area warrant. The government has failed to demonstrate that the frequency with which illegal aliens are transported past the San Clemente checkpoint is sufficiently high to justify its positioning at that point on Interstate 5. The government's own statistics obtained from the return on the warrant of inspection indicated that only 0.12% of the passing cars were found to contain "illegal aliens." While petitioner speculates that the figure is inaccurate because of the ineffectiveness of the apprehension technique at the checkpoint, it certainly cannot justify its burden of establishing the frequency of transportation of aliens in

the area in question by reference to nothing more than speculation. Further, the ineffectiveness of the checkpoint operation persuasively dictates that the Fourth Amendment should not be strained to accommodate it.

Moreover, the San Clemente checkpoint is situated sixty-six miles from the international border. Petitioner has not demonstrated that it would be impracticable to place the traffic checking operation in an area near the border. Instead, petitioner's argument reverts to the contention that it would be too inconvenient and too expensive to conduct this operation in such an area. These factors are clearly insufficient to warrant the erosion of the Fourth Amendment rights of the innocent members of the traveling public traversing the San Clemente checkpoint.

ARGUMENT

I.

AN IMMIGRATION STOP FOR ILLEGAL ALIENS, WHETHER CONDUCTED PURSUANT TO A ROVING, TEMPORARY, OR FIXED CHECK, MUST BE SUPPORTED BY REASONABLE SUSPICION AS DEFINED IN UNITED STATES V. BRIGNONI-PONCE, 422 U.S. 873 (1975).

The San Clemente checkpoint is a permanent roadblock of all traffic proceeding north between California's two largest cities, San Diego and Los Angeles, and is situated 66 miles north of the Mexican-American border. The Border Patrol operation of the checkpoint is totally unregulated in that officers at the checkpoint have complete and unfettered

discretion to stop and refer any vehicle off the highway for interrogation and vehicle inspection purposes. The checkpoint is manned by uniformed, fully-armed, Border Patrol law enforcement officers standing in the middle of the highway. As decelerating oncoming vehicles approach the officer's position, the latter visually determines whether or not to refer each car to the secondary position off the highway for interrogation and inspection of the viewable interior of the car. *Martinez-Fuerte, supra*, at 312-313.

Most traffic is first stopped on the highway at the San Clemente checkpoint for the initial visual examination by the point officer and, if traffic is light, questioning. If the officer believes the car should be further examined, based upon his own subjective evaluation, he may refer it off the highway for further investigation. In *United States v. Baca*, 368 F.Supp. 398, 415 (S.D.Cal. 1973), the district court judge found that at the San Clemente checkpoint "the average motorist" is stopped although it may be "nothing more than a fleeting stop" (*Id.* at 415). Petitioner asserts that although the district court in *Baca* found that the "average" motorist does come to a stop in the middle of the highway, that "the Border Patrol has informed us that, . . . very few come to a full stop . . ." (Brief for Pet. 58, n. 23). Except by resorting to similar self-serving citations to matters not of record, respondents cannot challenge this new allegation. Suffice it to say that the statement in *Baca* concerning the "average" motorist and the picture of the San Clemente checkpoint belie the assertion of the petitioner.[6]

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[6] This picture was originally submitted in *Baca* and may be found in the government reply brief in *Ortiz*, at 1a; it accurately reflects what confronts the motorists approaching the San Clemente checkpoint. It strains credulity to think that motorists would not stop at stop signs flanked by armed Border Patrol personnel standing in the middle of the highway.

In *Almeida-Sanchez*, the only asserted justification for the Border Patrol's alleged right to causelessly stop and search every car within 100 miles of the border area was § 287(a) of the Immigration and Nationality Act, 8 U.S.C. §1357(a) and its accompanying regulation, 8 C.F.R. §287.1. This Court held that such an extravagant license to stop and search was not granted by the statute and regulation. The license sought to justify the current stop and inspection procedure at the San Clemente checkpoint is even more extravagant than that requested and rejected in *Almeida-Sanchez*. While roving patrols involved a single officer stopping a single vehicle in isolated, rural areas near the border, the government seeks a *carte blanche* to stop and inspect all traffic between two of the largest cities in the United States at a point 66 miles north of the international border.

For the reasons expressed below, this application to deconstitutionalize inland highway arteries well within the borders of the United States must again be firmly rejected.

A. There are no facts of constitutional significance which distinguish causeless automobile stops and passenger interrogations conducted as a result of roving, temporary, or fixed Border Patrol checks.

The only difference between the stop and interrogation in this case and that which was the subject of review in *United States v. Brignoni-Ponce, supra*, is that here respondent's stop occurred *at* the fixed checkpoint rather than by the roving Border Patrol car which emanated *from* the same checkpoint in *Brignoni-Ponce*.

Unlike Brignoni-Ponce who was "redlighted" to the side of the road by a Border Patrolman in a marked vehicle 66 miles from the border because he and his passengers appeared to be of Mexican descent, the respondent was initially stopped twice – first by uniformed, armed Border Patrolmen standing in the middle of Interstate 5, and then by the interrogating officer at secondary for no stated reason. The difference in the intrusion to the victim, of course, is virtually nonexistent. This Court has never held a stop and interrogation at a roadblock to be less intrusive than a stop and interrogation resulting from a roving patrol vehicle.

Although the intrusion to the victim is the same at roving, temporary, and permanent checkpoints, the latter two operations do differ from the roving procedure in that millions more of the traveling public are forced to place their liberties in the hands of the officers at checkpoints. Roving patrol operations located in remote areas close to the border involve less Border Patrol-citizen contacts while the San Clemente checkpoint operation alone involves a massive, permanent roadblock of thousands of vehicles each day well away from the border. The yearly traffic stopped at this roadblock is in excess of ten million vehicles per year. *Ortiz, supra*, at 893.

For constitutional purposes, this examination of the similarities in respondents' stops and interrogations and that of Brignoni-Ponce is decisive. In both cases, the Border Patrol agents had no probable cause before the stop or subsequent interrogation, nor was there the "reasonable suspicion" found sufficient for a street detention and weapon search in *Terry v. Ohio*, 392 U.S. 1 (1968) and *Adams v. Williams*, 407 U.S. 143 (1972).

The officers did not have reason to believe that respondents had crossed the border, been in contact with anyone that had, or has aliens in their vehicles. Just as in *Almeida-Sanchez*, *Brignoni-Ponce* and *Ortiz*, the stops and interrogations "in the present case [were] conducted in the unfettered discretion of the members of the Border Patrol, who did not have . . . probable cause, or consent." *Almeida-Sanchez*, *supra* at 271. This permanent roadblock offers the Border Patrol just the "field day" in stopping automobiles which it was declared not to have in *Almeida-Sanchez*, *supra* at 269. The government can point to no regulations of any judicial or administrative authority which circumscribe the discretion of the Border Patrolmen at the checkpoint in determining whom they shall subject to the more intrusive interrogation at secondary after the initial primary stop (B.Tr. 65, 201-202, 208, 380-381).[7] Moreover, because over a thousand cars per hour are stopped at primary for the initial inspection, the permanent roadblock at San Clemente offers more opportunities for the exercise of the Border Patrolman's limitless discretion and embarrassment to the victim referred off the highway than occurs in roving stops by individual officers in rural areas near the border.

Petitioner again argues that the safety features at permanent checkpoints involving lighting and warning signs somehow make the subsequent intrusion on the travelling public less traumatic, thus magically metamorphosizing unconstitutional activity into legal action. Respondents again submit that safety and civility are norms expected of governmental officers in conducting stops, interrogations, and inspections of vehicles. No

[7] B. Tr. refers to the transcript in the *Baca* hearings.

court has ever held that causeless stops and interrogations by law enforcement officers attain legal status solely because they are conducted in a safe manner. A modest but non-life threatening violation of the Fourth Amendment remains unconstitutional activity.

Regularity of enforcement was a key consideration to this Court in *Ortiz* and *Brignoni-Ponce*. In *Ortiz*, the Court was "not persuaded that the checkpoint limits to any meaningful extent the officer's discretion to select cars for search" (at 895). The two-stop procedure in the case at bar demonstrates that, as in *Ortiz*, "checkpoint officers exercise a substantial degree of discretion in deciding which cars to search [or stop]" . . . for no officer ever would have to justify his decision to search [or stop] a particular car" (*Id.* at 896).

The point officer at the San Clemente checkpoint selectively picks cars for diversion off I-5 for the car inspection and occupant interrogation. Because the average hourly traffic amounts to some 1200 cars, the officer has only a second or two[8] to glance at each vehicle and make the decision whether to allow the vehicle to pass or to divert it off the highway. When a car is diverted off the road for the more intrusive inspection and interrogation, approximately twenty vehicles per minute, subjected only to the "fleeting" stop at primary, will pass the diverted motorist. Since the average time for a secondary stop is alleged to be three to five minutes (Brief for Pet. 53), 60 to 100 cars

[8] In this respect, a roving stop is more practical since officers may follow a suspect car for miles to determine whether or not factors exist for a stop and interrogation based upon reasonable suspicion to believe an immigration violation is taking place.

will pass the victim motorist subjected to the more detailed inspection and interrogation. These detained motorists "may not be reassured by seeing that the Border Patrol ... [stops] other cars as well for "[w]here only a few are singled out ... at San Clemente, motorists may find the [referral off the highway and interrogation] ... especially offensive." *Ortiz, supra*, at 895.

The government concedes that Border Patrol officers, in selecting cars for inspection at the checkpoint, do rely on "the complexion and physiognomy of the occupants of a vehicle. They are, after all, looking almost exclusively for illegal Mexican entrants, and it would affront common sense to expect that facial appearance or skin color would play no part in arousing their suspicions" (Reply Brief for Pet. 12, *United States v. Ortiz*, No. 73-2050). Because the point officer at a checkpoint has but a second or two to make the decision to allow a car to pass or refer it off the road for further inspection, the factor of skin color will play a key role. In contrast, an officer on roving patrol has more time to consider a multitude of other factors that make his decision to stop the car reasonable and less likely to be based solely on a skin color test.

The similarities of causeless roving and checkpoint stops for interrogation purposes extend to other areas. Just as a traveler on a road has no notice of the likelihood of a roving stop, travelers on highways well within our national borders do not anticipate such activity at inland checkpoints (B.Tr. 281). Flashing red lights and armed officers initiate both types of stops. One or two officers conduct the interrogations.

In evaluating the roving type stop in *Brignoni-Ponce*, this Court stated:

> [W]e hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion.
>
> * * *
>
> In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. Roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.4 million, is located on the border. Texas has two fairly large metropolitan areas directly on the border: El Paso, with a population of 360,000, and the Brownsville-McAllen area, with a combined population of 320,000. We are confident that substantially all of the traffic in these cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens. To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. The only former limitation on that discretion appears to be the administrative regulation defining the term "reasonable distance" in §287(a)(3) to mean within 100 air miles from the border. 8 C.F.R. §287.1(a) (1975). Thus, if we approved the Government's position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a

busy highway, or a desert road, without any reason to suspect that they have violated any law.

We are not convinced that the legitimate needs of law enforcement require this degree of interference with lawful traffic .... [T]he nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators. Consequently, a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference. Under the circumstances, and even though the intrusion incident to a stop is modest, we conclude that it is not "reasonable" under the Fourth Amendment to make such stops on a random basis. (At 881-883).

The above considerations apply equally to the circumstances here involving a roadblock stopping all northbound traffic where a select minority of motorists are subjected to the more intrusive referral off the highway for further inspection and interrogation at secondary. It is respondents' position that there is little difference between the actions of the Border Patrol in this case and in *Ortiz;* thus, probable cause should be the requisite antecedent to the referral off the highway and interrogation/inspection procedure while reasonable suspicion should be required for the initial stop at primary. See *United States v. Barbera*, 514 F.2d 294, 298 (2d Cir. 1975) (seizure of alien on bus near border by Border Patrol held to be a search).

The requirement of reasonable suspicion for checkpoint stops is the "logical, and predictable, next step in the development of search and seizure doctrine under *Almeida-Sanchez v. United States*, 1973, 413 U.S. 266...." *Martinez-Fuerte, supra*, at 314. Justice White,

concurring in this Court's judgments in *Ortiz* and *Brignoni-Ponce* agrees "that checkpoint investigative stops, without search, will be difficult to justify under the Fourth Amendment absent probable cause or reasonable suspicion" (at 915). The facts of the instant case demonstrate that the San Clemente roadblock, fixed in nature, operates without any nexus to the border. As the court below found, there is no evidence that cars passing the checkpoint emanate from the border and in fact approximately 99.9% of the vehicles passing the checkpoint were found to contain no immigration violators. *Martinez-Fuerte, supra*, at 322. Given these facts, the words of Circuit Judge Oakes are appropriate:

> The problem of illegal immigration is one of national concern. The adverse economic impact caused by illegal aliens is substantial and well documented. But to respond to this problem by watering down the probable cause requirements of the Fourth Amendment is most surely to take the lowest constitutional road. It would be dangerous precedent indeed for an economic problem, regardless of its magnitude, to provide the basis for the erosion of constitutional principles; much the more so when alternative solutions to the economic problem have been insufficiently explored by the other Branches of Government. *United States v. Barbera*, 514 F.2d 294, 301-302 (2d Cir. 1975).

B. In balancing the needs of law enforcement against the public's rights to travel within the borders of the nation, less intrusive alternatives as well as the effectiveness of the current checkpoint operation must be considered.

The operation of inland fixed checkpoints is but one of numerous Border Patrol operations for deterring aliens from illegally entering the United States. Inland checkpoints take away from the border area personnel needed to protect against illegal entry at the first opportunity – the border itself. Despite such manpower deployment, all checkpoints combined accounted for only 8% of the total deportable aliens apprehended in 1973,[9] and have proven to be ineffective in either deterring or apprehending aliens. The San Clemente checkpoint, for instance, apprehends only about 5%[10] of the illegal alien traffic going through it. In one twenty-day working period, seventy Immigration and Naturalization Service (INS) officers apprehended almost as many deportable aliens in Los Angeles than were apprehended in an entire year at the San Clemente checkpoint. *Hearings Before the Subcommittee on Immigration, Citizenship, and International Law of the Committee on the Judiciary*, House of Representatives, 93d Cong. 1st Sess., p. 4 (26 July 1973).

The INS has numerous alternative programs other than checkpoints to deter and apprehend deportable aliens; however, it is with Congress that the most meaningful deterrent may be found. Legislation to make the knowing employment of a deportable alien illegal is the

[9] See note 17 *infra*.

[10] See note 18 *infra*.

only effective way of deterring the entry of poor aliens who come to the United States in search of work. The problem, as Judge Oakes suggests above, is one for the other branches of government to solve. Justice White, concurring in *Ortiz* and *Brignoni-Ponce*, pointed to the ineffectiveness of traffic checking and the failure of the other branches to address the problem.

> The entire system, however, has been notably unsuccessful in deterring or stemming this heavy flow; and its costs, including added burdens on the courts, have been substantial. Perhaps the judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness as long as it is lawful for business firms and others to employ aliens who are illegally in the country. This problem, which ordinary law enforcement has not been able to solve, essentially poses questions of national policy and is chiefly the business of Congress and the Executive Branch rather than the courts (*Id.* at 915).

We do not suggest that the alternatives posed below are a panacea which will eradicate the problems near the border. Rather, they will serve as a complement to a constitutional law enforcement technique of stopping vehicles based upon reasonable suspicion and searching for aliens on probable cause.

1. Inland fixed checkpoints are but one of numerous Border Patrol operations to deter aliens from illegally entering the United States and other constitutional alternatives, as yet untried, exist.

In *Camara v. Municipal Court*, 387 U.S. 523 (1967), this Court recognized that there was almost unanimous

agreement that the *only way* to enforce housing codes is by periodic inspections of all buildings within a geographic area. The Border Patrol is not limited to checkpoints miles within the United States as a means of deterring illegal alien entry and apprehending entrants. The primary defense against illegal alien entry should be at the border. Acting Immigration and Naturalization Service Commissioner Greene testified in *Baca* that the ideal place for stopping and deterring illegal alien entry is at the border (B.Tr. 53, 60). Checkpoints well within the United States are merely one of many secondary supports to the watch that takes place at the border (B.Tr. 72-73). There are at least nine other Border Patrol operations which are utilized to deter and apprehend illegal aliens (B.Tr. 111). These functions include, for example, inspections at or very near the border itself (B.Tr. 111), patrol car observation in areas somewhat removed from the immediate border areas (B.Tr. 112), farm and ranch checking (B.Tr. 112), public transportation inspection of buses, passenger trains, freight trains, and aircraft usually at transportation terminals (B.Tr. 113), metropolitan patrols (B.Tr. 113), industrial checking (B.Tr. 113), and a boat patrol and stowaway inspection program (B.Tr. 114). Other law enforcement agencies turn over a substantial number of deportable aliens to the Border Patrol (B.Tr. 114). In fact, the total number of illegal aliens apprehended by other agencies and turned over to the Border Patrol exceeds the total number of aliens captured by *all* checkpoint operations (B.Tr. 231).

In addition to these alternative operations to deter and apprehend illegal alien entrants, the Border Patrol also has the power to stop all vehicles and persons at

points which constitute the functional equivalent of the border. *Almeida-Sanchez, supra* at 273; *see also United States v. Byrd*, 483 F.2d 1196, 1199, n. 7 (5th Cir. 1973) (a point seven miles north of the international border was deemed a plausible functional equivalent). Many other stops and searches away from the border may be conducted by the Border Patrol where there is "a reasonable certainty" that persons have just crossed the border illegally and entered a vehicle. *United States v. Markham*, 440 F.2d 1119 (9th Cir. 1971); *United States v. Weil*, 432 F.2d 1320 (9th Cir. 1970). Also, extended border searches are permissible anywhere in the United States if continuous surveillance of a vehicle from the border has been maintained by the Border Patrol. *Alexander v. United States*, 362 F.2d 379 (9th Cir. 1966). In addition, this Court has approved roving Border Patrol stops of vehicles in border areas where the agent has a reasonable suspicion to believe illegal immigration activity is afoot. *Brignoni-Ponce, supra.*[11]

[11]See also Ninth Circuit holdings allowing stops and interrogations based upon "founded suspicion." *United States v. Nunez-Villalobos*, 500 F.2d 1023 (9th Cir. 1974) (car seen twice traveling in opposite directions near border area notorious for smuggling at an unusual hour); *United States v. Ojeda-Rodriguez*, 502 F.2d 560 (9th Cir. 1974) (car appeared heavily loaded although only driver visible proceeding near border and car wandered from side to side of road); *United States v. Mora-Chavez*, 496 F.2d 1181 (9th Cir. 1974) (car stop near border after electronic sensor activity alerted agents to possible border intrusion); *United States v. Jaime-Barrios*, 494 F.2d 455 (9th Cir. 1974) (investigative stop approved based upon agent's knowledge of high smuggling in area, lack of recognition of the vehicle or driver); *United States v. Bugarin-Casas*, 484 F.2d 853 (9th Cir. 1973) (Mexican-appearing driver of typical vehicle used in smuggling ventures which was riding low in rear in an area of high smuggling activity.

Also, the Border Patrol has continued to use "electronic intrusion alarm systems along the northern and southern borders." Dep't. of Justice, 1974 *Annual Report of the INS* 10 (1974). [hereinafter cited as 1974 *Annual Report*]. These devices detect movement of persons in border areas without the necessity of stationing personnel in the area. The General Accounting Office has noted the lack of interagency cooperation in resolving the illegal alien problem. While the INS reports that efforts to solicit the aid of the Department of Health, Education and Welfare, the Internal Revenue Service, and the Social Security Administration have begun, this is an area which if developed would not only detect aliens unlawfully within the United States, but would deny them welfare, unemployment, educational and other benefits. *See* 1973 *Hearings, supra*, at 115-119. Such a multiagency approach would provide considerable deterrent impact to illegal alien entry and is a potent alternative now available.

With the above considerations in mind, the Ninth Circuit Court of Appeals concluded that:

> "We are not persuaded that laws prohibiting illegal immigration will be rendered simply unenforceable should we deny to the government the power to stop and search automobiles, without probable cause or a warrant, at fixed checkpoints." *United States v. Bowen*, 500 F.2d 960, 965 (9th Cir. *en banc* 1974), *rev'd on other grounds*, 422 U.S. 916 (1975).

It is with Congress, as suggested above, that the primary deterrent to the entry of illegal aliens may be found. It is no secret that the vast majority of illegal aliens entering this nation come to find employment.

Legislation to make the knowing employment of illegal aliens a crime has languished in Congress for several sessions.[12] One Ninth Circuit jurist noted years ago that the "employment of . . . aliens is primarily responsible for the whole Mexican alien problem." *Herrera v. United States*, 208 F.2d 215, 218 (9th Cir. 1953) (Pope concurring). Testimony in *Baca* by the then Acting Commissioner Greene indicated that passage of such legislation "would be one of the greatest deterrents oncoming" (B.Tr. 90).

The court below also noted that "the influx of aliens could conceivably be stemmed in various ways." *Martinez-Fuerte, supra* at 318-319. It bears repeating that this entire discussion of alternatives stems from the position of the government which "chooses to pitch its case upon an alleged unavoidable necessity if the laws are to be successfully enforced." (*Id.*)

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[12]H.R. 982, the "Rodino Bill," 93d Cong., 1st Sess. (1973) passed the House of Representatives on 3 May 1973 after clearing the House Judiciary Committee by a 30 to 2 vote. The Senate has never acted on it. Current criminal statutes not only do not discourage employers from hiring illegal aliens, but have the opposite effect. Title 8 U.S.C. § 1324(a)(3) makes it a felony to conceal, harbor, or shield illegal aliens. However, the last sentence of the section reads: "Provided, however, that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." James D. McKevitt, Assistant Attorney General for Legal Affairs, testified before the House Judiciary Committee that:

> "Not only is the employment of unlawful aliens not illegal under present law, but such employment actually appears to be condoned by the existing provision in Section 247(a)(4) that employment shall not be deemed to constitute harboring of aliens." *Hearings Before Subcommittee Number 1 of Committee on the Judiciary*, House of Representatives, 93d Cong. 1st Sess. 7 (March 7, 1974).

The court below noted that increased manpower at the border itself is a sensible alternative. The Acting Commissioner of INS testified in *Baca* that most of those who enter without inspection are apprehended by Border Patrol officers on the line watch, from three to ten miles from the border, and praised their "track record" as rather good in this area. (B.Tr. 35, 238). However, the Deputy Chief Patrol Agent of the Chula Vista Sector admitted that there was room for improvement in the line area because of the "fence frequently [being] down" (B.Tr. 220), "large holes in the cyclone fence" (B.Tr. 221), "more sensor signals and more intruders than officers to handle" (B.Tr. 227), "frequently we would get alarms and by the time we got a unit there, a pickup has been made" (B.Tr. 264), and requests for "improvement and enlargement of the fence has been stricken in [Congressional] Committee for many years" (B.Tr. 243).

The testimony of Agent Batchelor that pickups of aliens are primarily made "down in the South Bay area, Imperial Beach, on into Chula Vista . . . on the Otay Mesa, . . . on Highway 94, . . . old Highway 80" and that the "bulk of smuggling pickups are made in . . . the first fifteen to twenty miles of the border itself" (B.Tr. 148), alone is sufficient to hold that the operation of the San Clemente checkpoint located some forty miles north of that area is not reasonably related to the border. The same witness, adamant in his position that checkpoints could not be located along the roads in the South Bay area (B.Tr. 162), acknowledged that no checkpoint has been established between the port of entry and the area south of National City and that there had never been a study as to the possibility of conducting traffic checkpoints along Interstate 5 in that area (B.Tr. 225).

In other words, the Border Patrol argument of necessity (Brief for Pet. 19) actually is one of convenience because alternatives currently available simply are not tried.[13] The number of constitutional alternatives to alleviate the illegal entrant problem is limited only by the industry, ingenuity and will of those responsible in government.[14] This nation has survived more serious problems and threats posed by illegal drugs and firearms, illicit alcohol, domestic subversion, and organized crime, without diluting constitutional principles. When inland checkpoints operated without constitutional restriction prior to 1973, they were ineffective as deterrents to illegal

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[13]This Court heard similar claims by the government in *Almeida-Sanchez*, *Ortiz*, and *Brignoni-Ponce* concerning the checking procedure at issue in those cases. See also *Martinez-Fuerte*, *supra*, at 317:

> "The government argued in *Almeida* that roving patrol checks of automobiles were the only feasible means of apprehending 'illegal' aliens who crossed the border surreptitiously. *Almeida*, *supra*, 413 U.S. at 276 (Powell, J., concurring) . . . . We cannot ignore the irony in the government's present argument that the *only* effective way to apprehend aliens who have surreptitiously entered is to conduct fixed traffic checkpoints." (*Id.*, at n. 12)
>
> The government has cried "wolf" thrice too often.

[14]The new United States Attorney for the Southern District of California recently announced a new enforcement program to prosecute employers of illegal aliens who withhold income tax and social security contributions from their alien employees' pay. Los Angeles Times, November 6, 1975, p. K1.

entry. Today, *a fortiori*, they are of no deterrent value.[15]

2. Inland checkpoints not at the functional equivalent of the border are ineffective in deterring illegal alien entry into the United States.

The current estimate that up to twelve million aliens are illegally here (*Brignoni-Ponce, supra*, at 878) renders claims of the deterrent effect of checkpoints hollow (Brief for Pet. 19, 51).

Petitioner argues that inland checkpoints are "the single most important element of the enforcement plan, in terms both of apprehending illegal entrants and of deterring unauthorized entry" (Brief for Pet. 19). The government finds itself without a record to support these claims. First, other law enforcement agencies apprehend more illegal aliens than the total number caught by all checkpoint operations (B.Tr. 231). The Border Patrol makes most illegal entrant apprehensions at the "line watch" (border) and not at checkpoints (B.Tr. 29, 38). In terms of deterrence, the ease with which millions of aliens enter this country speaks for itself. For example, for the fare of $11.50 an alien may

[15]If the checkpoints are to be effective deterrents, says petitioner, they must pose a serious threat to smugglers of aliens (Brief for Pet. 21). With an estimated 20% of the population of Mexico now residing illegally in this nation, the credibility of checkpoints as deterrents to illegal entry is nonexistent. (The population of Mexico is 48,313,438. *IX Censo General de Poblacion* 1970. Mexico, D.F. Estimates of the number of Mexicans illegally residing here range to as many as ten million. See *U.S. News and World Report*, December 9, 1974, p. 77).

purchase a plane ticket from San Diego to Los Angeles and completely bypass the San Clemente roadblock as well as the two other strategically located traffic checkpoints (Temecula and Oak Grove) in the Chula Vista Sector of the Southern District of California (B.Tr. 248). Another means of successfully avoiding checkpoints is for the alien to get out of the smuggler's vehicle before reaching a checkpoint and simply walk around it (B.Tr. 279). Checkpoints can be easily evaded when they close during inclement weather, heavy traffic, or due to a lack of available manpower (B. Tr. 320-321).[16] Thus, at San Clemente, the checkpoint is closed about 30% of the time (B.Tr. 250).

All Border Patrol traffic checking operations during fiscal year 1973 accounted for only 8% of the total number of deportable aliens apprehended.[17] In

[16]Petitioner's arguments about checkpoint deterrence fall short of the mark when the captured alien entrant is merely returned to the Mexican border region to try his luck again at illegal entry. Most entrants are not prosecuted (Brief for Pet. 47) and are returned voluntarily to Mexico. In 1974, 182,351 aliens were apprehended who had been previously expelled. 1974 *Annual Report* 97 (1974). Moreover, most illegal alien entrants are not apprehended at all. As INS Commissioner Chapman stated in December of 1975, "it is painfully evident to our officers that they are capable of handling only a small percentage of the violations because of the limited funds and personnel. *Chapman, supra*, at 35.

[17]In fiscal year 1973, 655, 968 deportable aliens who had either surreptitiously entered (551, 328) or violated the terms of their permits (104,640) were apprehended. 1973 *Annual Report* 8-9 (1973). "In the United States, during fiscal year 1973, approximately 55,300 deportable aliens were apprehended by Border Patrol agents working traffic checking operations." *United States v. Baca*, 368 F.Supp. 398, 407 (S.D. Cal. 1973). By dividing the number of apprehensions at traffic checking operations by the total number of aliens arrested, the 8% figure is achieved. Since much of fiscal year 1973 involved roving, temporary and fixed checking operations, the percentage of aliens captured at permanent roadblock operations is a lesser percentage.

measuring the effectiveness of the immigration roadblock at San Clemente, the ratio between those illegal aliens traveling through the checkpoint and those detected and arrested should be examined. Border Patrol records and affidavits in this case indicate that San Clemente captures only about 5% of the alien traffic traveling through it north on Interstate 5.[18]

Despite these statistics, the petitioner's argument of deterrence is characterized by such reasoning as "the more effective it [the checkpoint] is, the less productive it is likely to be" (Brief for Pet. 51). This type of argument, which is necessarily impossible to verify, might have merit if almost twenty per cent of the Mexican population[19] were not currently illegally residing in the United States. The very presence of these people completely refutes the arguments of checkpoint deterrence.

Although inland checkpoints are deemed a "secondary line of defense" (A. 45), manpower commitments to the border are nominal in comparison. The supervising Border Patrol agent for the El Centro Sector testified that during a typical day only ten officers were committed to cover the seventy to seventy-five miles of border in his sector (B.Tr. 357). The supervising agent for the Chula Vista Sector

[18]Government figures (A. 46-47) reflect that about 319,000 illegal aliens traverse Interstate 5 each year. Government affidavits reflect that less than 17,000 allegedly illegal aliens were apprehended in 1973 at San Clemente out of the estimated 319,000 who had traversed north through that route. Thus, about 5% of the illegal alien traffic going through the San Clemente roadblock is apprehended.

[19]See note 14, *supra*.

indicated that during a shift of a typical week day, approximately twenty Border Patrol officers would be committed to cover the seventy miles of border in his sector (B.Tr. 229). Both of the supervising agents complained that they have not been authorized enough personnel (B.Tr. 227, 400), but the fact remains that the significant number of personnel devoted to the operation of inland checkpoints[20] deprives needed manpower from the border area. In fact, the number of officers devoted to border duty is insufficient to even respond to electronic sensor alerts which indicate the possibility of aliens crossing the border (B.Tr. 227).

The "zone defense" articulated by the Border Patrol in *Baca* reveals a small commitment of officers to the vast stretches of the immediate border area despite pronouncements that the border is where the primary defense is to be made (B.Tr. 53). The "zone defense"

[20]In *Baca*, the Border Patrol Handbook was introduced as Government Exhibit 43. A permanent checkpoint like that at San Clemente requires a huge manpower commitment to operate 24 hours a day. A fixed checkpoint operation requires one or two officers to maintain a point position in the middle of the highway to refer traffic to secondary. A second officer working with an interrogator and stationed near a patrol vehicle mans the secondary position (*Id.* at 9-16). Officers manning the point position must be rotated frequently to avoid fatigue inherent in this type of operation (*Id.* at 17). Personnel must be available in case a vehicle runs through the checkpoint or turns around before arriving (*Id.* at 18). To guard against aliens walking around the checkpoint, frequent patrols on both sides of the checkpoint are required (*Id.* at 3). Agent Richard E. Batchelor testified that twenty officers are assigned to the immediate border area in the Chula Vista Sector on a typical week day work shift (B. Tr. 291), while a total of forty-seven are stationed at the San Clemente checkpoint (B. Tr. 229, 267).

concept (B.Tr. 162, 166) provides the government a bootstrapping argument – it is impossible to efficiently patrol the Mexican-American border, but because of reliance on inland checkpoints, it weakens its manpower commitment there. Thus, with the Border Patrol's commitment to the "first line of defense" so meager, it is understandable that deportable aliens are arrested at inland checkpoints and why millions of others escape detection. Only thirty officers are devoted to patrolling the entirety of the California-Mexican border on a typical day shift (B.Tr. 229, 357). At the same time, forty-seven officers are needed for the twenty-four hour operation of the San Clemente checkpoint which is but one of the nine checkpoints in California (B.Tr. 267). Until the government makes a major commitment to apprehending and deterring aliens in the border area, it cannot point to self-created manpower shortages there to justify the existence of inland checkpoints.[21]

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[21]The ineffective placement of Border Patrol officers was demonstrated briefly in 1969 during "Operation Intercept." At that time a significant manpower commitment was made to the border area with the immediate effect of acting as an effective deterrent to aliens from Mexico illegally entering the United States (B. Tr. 258, 435). This result was obtained simply by increasing the number of officers at the border by an increment of 57 (B. Tr. 437). The "zone defense" strategy is similar to that of the Japanese Imperial General Headquarters during World War II. In seeking a defense to the American invasions of Japanese occupied islands in the Pacific, innovative tactics were devised:

> "The new tactics were to prepare a main line of resistance and defensive positions well in the rear of the beaches, place substantial forces in reserve to mount counterattacks at opportune moments, and offer token defense only at the beach." S.E. Morison, *The Two-Ocean War*, 426 (Little Brown 1963).

C. There exists no constitutional or statutory authority for random, causeless checkpoint stops of cars and interrogations of occupants without a reasonable suspicion to believe an immigration law is being violated; the relevant need mandates an articulable factual basis of reasonable suspicion to uphold a checkpoint stop.

The government, in seeking a constitutional theory to justify causeless checkpoint stops and interrogations under 8 U.S.C. §1357, relies on the previously rejected argument of law enforcement "need" (Brief for Pet. 19, 51). *Brignoni-Ponce, supra,* at 877; *Almeida-Sanchez, supra,* at 273-275. Even if this Court accepted such a theory of "need equals probable cause/reasonable suspicion," which it has not, we have shown above that checkpoints are ineffective in their purpose and that numerous alternatives to illegal alien apprehension and deterrence exist and are now in effect. There is no reason to believe that the requirement of reasonable suspicion for a checkpoint stop would end the role of checkpoints as one of many tools in this area of law enforcement. During the post-*Martinez-Fuerte* era in the Ninth Circuit, the San Clemente checkpoint has still been used as the base for roving stops based upon reasonable suspicion.[22]

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[22]As petitioner concedes, "[s]ome vehicles are stopped at checkpoints on the basis of articulable factors suggesting a break in the pattern of normal traffic" (Brief for Pet. 22). This summer, the Border Patrol conducted a program of using roving patrols near the San Clemente checkpoint. Calls would be placed to the checkpoint to determine if cars under the suspicion of the roving patrolman had been stopped previously. Such records are kept on a "rolodex." If the officer received such information, he would stop the car. Thus, in *United States v. Antonio Martinez-Gonzalez*, Mag. No. 75-1806M (S.D. Cal. 16 July 1975), the government relied on this factor to justify the stop. Although

This Court has held that the empowering statute, 8 U.S.C. §1357, requires reasonable suspicion for roving stops. For constitutional purposes, there are no rational factual characteristics to distinguish checkpoint from roving stops. Although petitioner argues a checkpoint stop is no more intrusive than a stop at a traffic light (Brief for Pet. 31-32), unlike the stop at a traffic light, checkpoint procedure involves armed law enforcement agents inspecting cars and interrogating drivers and passengers for evidence of crime. This includes a stop of a vehicle traveling 55 miles per hour on a major freeway; a visual vehicle and occupant inspection by a point officer; an order to proceed off the highway; interrogation by at least one other officer; an inspection of what is in plain view inside the automobile; a possible demand for a show of immigration documents and perhaps a "request"[23] to search the trunk. All of

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the unrestricted checkpoint stop procedure of the past must remain a part of history, the San Clemente checkpoint will still serve a valid purpose such as a base of operation to receive calls for stops, and to conduct reasonable suspicion stops. As Justice Powell stated, "[t]he nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators. Consequently, a requirement of reasonable suspicion for stops allows the government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference." *Brignoni-Ponce, supra,* at 883. See also *Baca, supra,* at 418 where the court noted that a checkpoint operated upon advance information gave the officers "perhaps probable cause to stop and question. . . ."

[23]Causeless trunk searches have taken place at San Clemente despite the Ninth Circuit ruling in *United States v. Bowen, supra,* that probable cause was a necessary antecedent. The government claims these took place as a result of probable cause or consent. As to the latter basis for search, see note 1 *supra.* In *United States v. Wise,* No. 75-3014 (9th Cir. argued January 9, 1976), testimony from the former law clerk to the district judge revealed that the clerk, directed off the highway at San Clemente, was ordered to open the trunk of his vehicle without

the above may take place if the motorist is one of the unlucky persons arbitrarily selected for "secondary" inspection by the point officer. The entire process takes three to five minutes (Brief for Pet. 53).

The need for an articulable, constitutionally recognized standard of reasonable suspicion to justify checkpoint stops is significant where the factor of race is part of the equation for law enforcement procedure. Immigration checkpoint stops, which allow agents unbridled discretion in selecting their targets for the more intrusive interrogation and visual vehicle inspection, provide multiple opportunities for abuse. This Court has held that the potential for abuse is a significant factor in evaluating privacy invasions. *Davis v. Mississippi,* 394 U.S. 721, 727 (1969). As Professor Greenberg has recently pointed out:

> "Harassment is not confined to inspections motivated solely by personal spite and bad faith, but includes overzealous enforcement. The latter problem is considerably more acute . . . [where] one of the main aims of the inspection scheme is to serve as a credible deterrent. Government use of the search power to deter, unchecked by neutral inquiry into the necessity for a given level of deterrence, creates the possibility of substantial abuse, since it is undeniable that the greater the governmental abuse, the greater the deterrent effect." Greenberg, "The Balance of Interest Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since *Camara* and *See*," 61 *Cal.L.Rev.* 962, 1023 (1973).

At the San Clemente checkpoint on Interstate 5, an entire traveling public of over ten million cars per year

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his consent and, of course, without probable cause (R.T. 37). This occurred while the checkpoint was operating pursuant to the inspection warrant.

is subjected to privacy invasions, although not all of the drivers and occupants are subjected to the same degree of intrusion. The unequal treatment at the checkpoint, not based on an articulated evidentiary foundation of reasonable suspicion of illegal conduct, leaves the decision of whom to subject to interrogation and referral off the highway completely within the discretion of the Border Patrolmen who may exercise that discretion for other than proper reasons.

The most obvious potential for abuse at permanent checkpoints such as at San Clemente is the invidious discrimination against the millions of individuals of apparent Latin American descent traveling on the highway.[24] Much of the traffic through the checkpoint involves recently immigrated Mexicans returning from visits to relatives in Mexico to their Los Angeles homes (B.Tr. 155). The Imperial Valley, located in the Southern District of California, is approximately 52% Mexican-American (B.Tr. 346). The Ninth Circuit has taken judicial notice "that there is a large Mexican-American population in the Oceanside area . . . [and] it is impossible to determine from looking at a person of Mexican descent whether he is an American citizen, a Mexican national with proper entry papers, or a Mexican alien without papers." *United States v.*

[24]We pointed out in *Ortiz* (Brief for Resp. 46-47), the privacy-related interests violated by the San Clemente checkpoint; they include: a) freedom from arbitrary governmental interference; b) an individual's liberty of positioning, that is the right to decide to remain or go elsewhere; c) an individual has a liberty of movement, that is, free passage without interruption; d) an individual has a Fourth Amendment interest in avoiding those whom he does not wish to encounter; and e) the occupant of a moving automobile has a privacy interest to be free from a stop and visual inspection of the car interior by a Border Patrol officer at a checkpoint. See Note, "Automobile License Checks and the Fourth Amendment," 60 *Va.L.Rev.* 666 (1974).

Mallides, 473 F.2d 859, 860 (9th Cir. 1973).[25] Oceanside is just 18 miles to the south of the San Clemente checkpoint on Interstate 5. The major cities in Southern California contain huge populations of persons validly residing in the United States who happen to be of Latin American ancestry.[26] Indeed, Los Angeles, California, has "the largest Mexican population of any city on the continent, with the exception of Mexico City itself." *Fernandez v. United States*, 321 F.2d 283, 286 (9th Cir. 1963).

The focus at the San Clemente checkpoint is on illegal aliens from Mexico. With a substantial traveling public of lawfully admitted Latin American residents and citizens passing through the checkpoint, it is apparent that referrals to the secondary area for interrogation based upon skin color would constitute invidious discrimination and a denial of equal protection of the laws to a minority population. As this Court said in *Brignoni-Ponce, supra*, at 886-887:

> Even if they [the agents] saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native-born and naturalized citizens have the

[25]See also *United States v. Camacho-Davalos*, 468 F.2d 1382, 1383 (9th Cir. 1972) (Border Patrol agent's description of occupants of a truck as Mexican appearing Spanish-speaking and without immigration documents "fits thousands of American citizens").

[26]See Appendix A to this brief which is a map of the communities to the south of San Clemente, California originally submitted in *Baca* as Government Exhibit 5.

> physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens. The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.

Earlier in this brief, we pointed out that with the short amount of time available to view cars at a checkpoint, skin color would be a key criterion for referral to secondary. With deportable Mexican aliens the object of inspection, arbitrary stops and referrals to secondary may be "a major source of friction between the police and minority groups." *Terry v. Ohio*, 392 U.S. 1, 14n. 11 (1968), quoting the *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police* 183 (1967).[27] These sensitive considerations led the drafters of the *Model Code of Pre-Arraignment Procedure*[28] to require an evidentiary basis for automobile stops and searches. The reporters for the *Model Code* stress that:

[27]"The hatred and fear of the police, whether overt or hidden, felt by many Negroes, Puerto Ricans and Mexican-Americans cannot be overstated." American Civil Liberties Union, *Police Power and Citizens' Rights* 11 (1967). See also, e.g., *National Advisory Commission on Civil Disorders, Report* 93 (1968).

[28]*Model Code of Pre-Arraignment Procedure Section* 110.2(2) (Official Draft No. 1, 1972). The *Model Code* would only suspend the reasonable suspicion requirement for stops at roadblocks during emergency situations.

> There are two different sorts of costs associated with the stop. First, there is the imposition upon innocent persons even when the police stay within the terms of the authority granted. Such imposition is an evil in itself, and may lead as well to the further evil of resentment against the police and civil authority in general. Second, there is the danger that the stop is susceptible to abuse. It may be used not for its authorized purpose but to harass persons to whom the police may be hostile or about whom they feel a generalized suspicion or apprehension—e.g. youths, unconventionally attired persons, negroes in white areas, whites in negro areas. And the stop and frisk carry the special potential that they may be used to circumvent constitutional restrictions on search and seizure by providing a pretext to search for narcotics and gambling slips. The danger of abuse is argued to be particularly serious, since the stop must be predicated on a more permissive standard than arrest thus making it more difficult to confine the authority to proper cases and to ascertain after the fact whether an abuse has indeed taken place.[29]

For all of the reasons stated in Section I of this brief, Border Patrol checkpoint officers must be required to have a reasonable suspicion prior to conducting a stop to inspect a car or interrogate the occupants.

D. No warrant is required for operation of checkpoints for the purpose of stopping traffic if the agents have a reasonable suspicion that each car stopped possesses immigration violators.

Our argument that reasonable suspicion is the only necessary constitutional predicate for stopping cars at

[29]*Id.* at § 110.2, Comment 4(b).

checkpoints makes unnecessary the requirement for a warrant. None is necessary for roving stops since the reasonable suspicion standard provides the necessary protection against arbitrary and harassing stops of motorists on the highway. A warrant could not add significantly to this protection.

A holding that reasonable suspicion is necessary for checkpoint stops will bring about a balance to this Court's recent decisions in this area. As the constitutional requirement of probable cause is the same for roving and checkpoint searches (*Almeida-Sanchez* and *Ortiz*) so should reasonable suspicion be the standard for roving and checkpoint stops (*Brignoni-Ponce* and *Martinez-Fuerte*).

Petitioner, however, wants neither the protection of reasonable suspicion nor a warrant to permit checkpoint stops (Brief for Pet. 34-42). Again, as in *Ortiz*, petitioner argues that the checkpoint stop procedure is "reasonable" and there the analysis ends. For the reasons stated in this section and by the court below, the reasonableness argument fails for want of supportive facts, a record, and recognized constitutional support. See *Martinez-Fuerte, supra*, at 322.

The requirement of reasonable suspicion satisfies the Fourth Amendment requirement of reasonableness for seizures which is the standard by which a decision to seize is tested. In the criminal context, reasonableness requires the showing that something connected with criminal conduct will probably be found in the place to be inspected or seized. With respect to Border Patrol checkpoints such as at San Clemente, the reasonableness requirement is not met. There is no demonstration that the cars seized probably contain aliens; in fact, the court below found only about one out of a thousand cars contains immigration violators. *Id.* at 321.

In adopting the standard of reasonable suspicion for roving stops in *Brignoni-Ponce*, this Court relied upon *Terry v. Ohio*, 392 U.S. 1 (1968) where Chief Justice Warren, speaking for the Court, stated:

> [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of seizure or the search 'warrant a man of reasonable caution in the belief' that the action was appropriate? *Id.* at 21-22.

In each case, the particular intrusion must be justified by specific factual circumstances. The Court especially eschewed stops based upon hunches or unfair generalizations:

> Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more than inarticulate hunches, a result this Court has consistently refused to sanction. *Id.*

1. Petitioner's assertion that causeless, warrantless checkpoint stops have inherent safeguards to protect the individual motorists is contradicted by the record and experience.

Petitioner asserts checkpoint activity is "ordinarily subject to no variation in terms of location

and . . . operating procedure, . . . " (Brief for Pet. 38). Thus, so the argument goes, the aggrieved person may litigate any alleged Fourth Amendment violations at a post-stop hearing. In *United States v. United States District Court*, 407 U.S. 297 (1972), this Court speaking through Justice Powell stated:

> The Fourth Amendment contemplates a *prior judicial judgment*, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will be preserved through a separation of powers and division of function among the different branches and levels of Government. . . . prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights. *Id.* at 317-318 (Emphasis added).

The requirement of reasonable suspicion to support a stop is the "prior judicial judgment" insuring the reasonableness of the government activity at checkpoints. While we agree that a warrant procedure may be a difficult concept for the government to work under, it is the only alternative available in the absence of reasonable suspicion to believe each car stopped carries immigration violators. We consider the warrant aspect of this case in our next section; suffice it is to say that the government's petition for a *carte blanche* for checkpoint stops is the same request refused by this Court in *Almeida-Sanchez*, *Ortiz*, and *Brignoni-Ponce*.

In its argument against the warrant requirement, petitioner asserts that the checkpoint machinery is too delicate a mechanism for the judiciary to tamper with—after all, "basic decisions regarding the location of a checkpoint . . . are made by relatively high-ranking officials of the Border Patrol . . ." (Brief for Pet. 33)

The mobile nature of "permanent" checkpoints was demonstrated in *Baca* where pictures of the "permanent" checkpoints such as Temecula and Oak Grove, California, were introduced.[30] These photos show that these "permanent" checkpoints are nothing more than points on a road at, or near, where a government vehicle may station itself to stop on-coming traffic. The only difference between this type of fixed checkpoint and a roving check is that the officer steps out of his car to stop all traffic while in a roving check the officer follows a suspect vehicle and red-lights the motorist to a stop. These differences are hardly sufficient to cause a difference in the constitutional requirements justifying the activity. There are no more safeguards for checkpoint stops than with roving stops. When conducted free of constitutional restraint such as a warrant or reasonable suspicion, they violate the rights of an entire traveling public.

2. The right to travel freely within the nation is undermined by arbitrary checkpoint activity which lacks a demonstrable nexus to the border.

Unrestricted inland checkpoint activity not only violates privacy rights protected by the Fourth Amendment, but also interferes with the separate right of the citizenry to travel freely within the boundaries of the nation. The right of free travel in the interior of

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[30]Temecula and Oak Grove photos were introduced as Government Exhibits 31c (B. Tr. 176, 430) and 38 (B. Tr. 181-183; 475-476; 483; 488) respectively. They reveal nothing more than roadways where Border Patrol cars park and place portable road signs out to alert on-coming traffic.

the United States is fundamental and has roots over 100 years old. In the *Passenger Cases*, 48 U.S. 282, 492 (1849), Chief Justice Taney stated:

> We are all citizens of the United States; and as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own states.

In *United States v. Guest*, 383 U.S. 745, 758 (1966), this Court held:

> Although the Articles of Confederation provided that 'the people of each state shall have free ingress and regress to and from any other State,' that right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.

This fundamental right of travel was also recognized in *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969); *Edwards v. California*, 314 U.S. 160 (1940); *Williams v. Fears*, 179 U.S. 270, 274 (1900); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 49 (1867).

A reasonable suspicion that illegal immigration activity is afoot is an adequate constitutional basis upon which to interrupt motorists' respective rights of privacy and free travel. Absent that safeguard, only a warrant could permit the intrusion such as exists at San Clemente. To that issue, we now turn.

II.

THE WARRANT OF INSPECTION IS AT VARIANCE WITH THE FOURTH AMENDMENT.

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The warrant of inspection issued by the magistrate in this case, as the government apparently concedes, does not contain any of the limitations[31] traditionally believed to be necessary to protect the citizenry from the excesses of over-zealous officials. *Martinez-Fuerte*,

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[31] "The rationale is evident if we keep in mind the two distinct constitutional protections served by the warrant requirement. First, the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause. The premise here is that any intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity. [Citations omitted] distinct objective is that those searches deemed necessary should be as limited as possible. Here, the specific evil is the 'general warrant' abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings. See, e.g., *Boyd v. United States*, 116 U.S. 616, 624-630; *Marron v. United States*, 275 U.S. 192, 195-196; *Stanford v. Texas*, 379 U.S. 476. The warrant accomplishes this second objective by requiring a 'particular description' of the things to be seized." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971).

supra, at 315-316. In one of the first cases dealing with the interplay between the requirements of the Fourth Amendment and legislation enacted by Congress, *In re Jackson*, 96 U.S. 727, 24 L.Ed. 877 (1878), the necessity for applying the specificity requirements contained in the Fourth Amendment in a literal manner was noted. The Court held that the inspection of first class mail was not subject to discretionary review and could only be accomplished after a warrant had been obtained upon oath or affirmation particularly describing the matter to be seized. Since the date of the *Jackson* decision, while this Court has at times employed a flexible balancing test in assessing the requirements of probable cause in the administrative inspection context, discussed, *infra*, it has never wavered from the principle that a neutral magistrate must interpose his judgment as to whether specific facts presented to him rise to the level of probable cause before a valid warrant authorizing the requested intrusion may issue. *United States v. United States District Court*, 407 U.S. 297, 316 (1972).

As the opinion of the court below correctly notes, the instant warrant does not provide either level of protection normally associated with the issuance of a valid warrant. *Martinez-Fuerte*, *supra*, at 315-316. Since the warrant contains no specific facts relating to particular individuals or vehicles, it does not disclose individualized probable cause to search or even reasonable suspicion to stop and inquire as required by the decisions of this Court's last term in *Ortiz* and *Brignoni-Ponce*.

> Nor does the warrant interpose the mediating judgment of the magistrate because the warrant is a blanket authorization for Border Patrol agents to stop all cars and to detain for interrogation certain cars at *their* discretion. They, not the magistrate, make the decision. *Martinez-Fuerte*, *supra*, at 316 [emphasis in original].

The same deficiencies in the infamous writs of assistance issued by the judiciary of the British Crown to enforce the collection of taxes and customs duties sparked widespread civil discontent and led to the inclusion of the Fourth Amendment to the United States Constitution in 1791.[32] The most notable of these writs was that secured in 1761 by Charles Paxton, the elder of the Office of the Surveyor of all Rates, Duties, and Impositions, obtained from a local court in order to assist him in collecting taxes for the Crown.[33]

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[32]N. Lasson, *History and Development of the Fourth Amendment to the United States Constitution*, 51-54 (1937); See also, Horace Gray, *Writs of Assistance*, contained in Appendix I to *Quincy's Massachusetts Reports* (1761-1772), hereinafter referred to as *Gray*.

[33]The document in its entirety reads as follows:

Province of the	)	George the Second by the Grace of
	)	God of Great Britain, France, and
	)	Ireland
Massachusetts Bay	)	King, Defender of the Faith, etc. –

To all and singular justices of the Peace, Sheriffs, and Constables, and to all other our offices and subjects within said Prov. & to each of you Greetings –

WHEREAS, the Commissioners of our Customs have by their Deputation dated the eighth day of Jany. 1752, assigned Charles Paxton, Esqr. Surveyor of all Rates, Duties and Impositions arising and growing due within the Port of Boston in said Province as by said deputation at large appears, WE THEREFORE command you and each you that you permit ye said C.P. and his Deputies and Servants from Time to time at his or their will as well in the day as in the Night to enter and go on board any Ship, Boat, or other Vessel riding, lying, or being within or coming to the said Port or any Places or Creeks appertaining to said Port such Ship, Boat, or Vessel then & there found to View

A comparison between the instant warrant of inspection (A. 52-53) and Paxton's Writ reveals a striking similarity. In neither document is specific information relating to any particular person or conveyance set forth, nor is the discretion of the officer in singling out the persons or objects to be inspected limited in any meaningful fashion. However, Paxton's Writ, which this Court characterized as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law,

& Search & strictly to examine in the same, touching the Customs & Subsidies to us due, And also in the day Time together with a Constable or other public officer inhabitating near unto the Place to enter and go into any Vaults, Cellars, Warehouses, Ships, or other places to search and see whether any Goods, Wares, or Merchandises in ye same Ships, Boats, or Vessels, Vaults, Cellars, Warehouses, Shops, or other Places are or shall be there held or concealed, having been imported, ship't or laden in order to be exported from or out of the said Port or any Creeks or Places appertain'g to the same Port; and to open any Trunks, Chests, Boxes, Fardells or Packs made up or in bulk, whatever in wh any goods, Wares, or Merchandises are suspected to be packed or concealed and further to do all Things which of Rt and according to Law and the Statutes in such cases provided, is in this Part to be done: and we strictly command you and every of you that you, from Time to Time be aiding and assisting to the said C.P., his Deputies and Servants and every of them in the execution of the Premises in all Things as becometh: Fail not at your Peril: WITNESS: Stephen Sewall, Esquire et cetra - *Gray*, 404-405.

that ever was found in an English law book",[34] contained more protection for the general citizenry than does the warrant now before the Court.

While Paxton's Writ was directed exclusively toward the discovery of undutied goods the Port of Boston, the warrant of inspection seeks to discover all violations of Title 8 of the United States Code (A-52). Further, Paxton's Writ directly affected only persons engaged in commerce in the Port of Boston while the instant warrant affects all motor traffic proceeding north on the Interstate 5 between San Diego and Los Angeles. Paxton's Writ limited the authority of the officer invoking its powers to the area immediately surrounding the Port of Boston, while the warrant of inspection authorizes millions of vehicle stops and interrogations each year sixty-six miles north of the border. The Writ also limited inspections of vaults, cellars, warehouses, shops, and other places on land to daylight hours while the warrant of inspection contains no similar limitations. In fact, the warrant here was a perpetual one renewed almost every ten days from 22 June 1974 through 5 March 1975. *See Martinez-Fuerte, supra*, at 312.

[34] *Boyd v. United States*, 116 U.S. 616, 625 (1886). Judge Oakes noted in *United States v. Barbera*, 514 F.2d 294, 301 (2d Cir. 1975) that: "one can suggest that in drafting the Fourth Amendment it was precisely such indiscriminate searches with which the Forefathers were primarily concerned, remembering that it was general warrants and writs of assistance which infuriated the Otises and Adams' [Citations omitted]. If general search warrants based on less than probable cause are to become the basis for official searches in such a side area, it would not be too bold to suggest that we have come a little way from *Entick v. Carrington*, 19 Howell St. Tr. 1029, 1063 (1765) (overturning a 'ridiculous warrant against the whole English nation')."

The court below traced the history of the warrant clause of the Fourth Amendment to demonstrate the illegality of the present warrant and we adopt it in this brief.[35] *Martinez-Fuerte, supra,* at 314-322. It is anomalous that on the eve of this nation's 200th year as a free, independent people, the government seeks to return to such a controversial British practice that was a major cause of the American Revolution. The government has come full circle and now seeks approval of an odious device. Although the eloquence and logic of James Otis' presentation was unable to prevent the British appointed judges issuance of the writ of assistance, the respondents have the advantage of the unmistakably clear language of the Fourth Amendment to denounce this warrant of inspection. If the Fourth Amendment, by its terms or the circumstances of its creation, has any meaning, such a warrant of inspection is invalid.

[35] In our brief below, we included a lengthy appendix on the historical evolution of the Fourth Amendment, which is also available to this Court. Much of the history is stated in the opinion of the court of appeals and in ***Boyd v. United States,*** *supra,* at 624-625. Also, we have attached to this brief as Appendix B a schematic comparison of the instant warrant to Paxton's Writ used by respondents at oral argument on 7 November 1974 before the court below.

A. THIS GENERAL WARRANT OF INSPECTION CONTRAVENES TRADITIONAL FOURTH AMENDMENT REQUIREMENTS OF PROBABLE CAUSE, SPECIFICITY OF PERSONS AND THINGS TO BE SEIZED, AND REASONABLENESS.

The warrant in this case allows "routine inquiries to determine the nationality and/or immigration status of the occupants" of vehicles traveling north on Interstate 5 five miles south of San Clemente, California (A. 52-53). What a "routine inquiry" constitutes is not defined. No limitation is made upon the vehicles to be stopped at the checkpoint. The warrant permits the "routine inspection" of vehicles for the presence of aliens (*id*). If "routine" means the continuation of past Border Patrol procedure at the checkpoint, again it is the agent in the field and not a neutral and detached magistrate who is determining what vehicles to inspect, refer off the highway and what individuals to subject to "routine inquiries."

This unbridled standardless delegation of authority to Border Patrolmen at the San Clemente checkpoint leaves to the patrolman in the field all of the decisions that should be made by the magistrate. The warrant issued in this case tears at the very heart of the Fourth Amendment directive requiring the magistrate to protect against baseless seizures through the warrant mechanism. Justice Powell spoke to this issue in *United States v. United States District Court,* 407 U.S. 297, 317 (1972):

> "But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment,

> which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.
>
> * * *
>
> [T]his judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government."

Simply stated, "The magistrate ought to judge; and should give certain directions to the officer." *Id.* Delegating total authority to law enforcement agents at the checkpoint to stop and inspect any vehicle, and interrogate occupants at their whim, constitutes an abandonment of the judicial function to law enforcement officers.

Since magistrates or judges can authorize only that which is lawful in the context of checkpoint stops and detentions, they can be presented with no more information on which to base a reasoned judgment than that exercised by the Border Patrolmen in the field. The information in the warrant and affidavits do not amount to legal cause justifying the stop of respondents' vehicles. If the patrolmen had sufficient cause to stop, this Court requires no warrant. *Brignoni-Ponce, supra.*

The use of the warrant is thus out of place. A warrant requires probable cause[36] and that term cannot be simply equated with government need. As this Court stated in a purely administrative context (home visits by welfare workers to insure compliance with regulations):

> The warrant necessarily would imply conduct either criminal or out of compliance with an asserted governing standard. Of course, the force behind the warrant argument, welcome to the one asserting it, is the fact that *it would have to rest upon probable cause, and probable cause* in the welfare context, as Mrs. James concedes, *requires more than the mere need of the caseworker* to see the child in the home and to have assurance that the child is there and is receiving the benefit of the aid that has been authorized for it. In this setting the warrant argument is out of place. *Wyman v. James,* 400 U.S. 309, 324 (1971) (Emphasis supplied).

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[36]Since probable cause pertains to the occurrence of a crime and the secreting of evidence in a specific place, the general warrant involved in this case should be examined to determine *what crime is involved.* There must be a nexus between the things to be seized and criminality. *Warden v. Hayden,* 387 U.S. 294, 307 (1967). The warrant under consideration states that "mass violations of the immigration laws of the United States (Title 8, United States Code) have been and are being committed . . ." (A. 52). Title 8 is a rather large section of the United States Code containing numerous statutes relating to criminal law violations. In allowing the Border Patrol to stop vehicles, make inquiry of the driver and occupants, inspect what is in plain view in the vehicle, and demand documents, the warrant fails to state any specific crime for which evidence may be found in the vehicles. For comparison purposes, consider the scope of a warrant for violations of Titles 18 or 26.

In arguing *Almeida-Sanchez*, the government agreed that such a warrant as considered here would add no protection or significant restrictions on the checkpoint conduct of the Border Patrol:

> The historic aversion to general warrants, as embodied in the Fourth Amendment, and the Court's decision in *Camara* that a magistrate should not review the basic agency decision to canvass an area, indicate that a 'warrant' approving the overall inspection program would not be a proper or useful judicial action. Hence, the interposition of a magistrate, even if it were feasible, could not add any significant protection in an otherwise reasonable inspection program. Brief for United States, 37-38 (1973). We agree.

B. THE ANALOGY TO ADMINISTRATIVE INSPECTION CASES DECIDED BY THIS COURT IS INAPPOSITE.

Relying upon Justice Powell's concurrence in *Almeida-Sanchez*, 413 U.S. 275-285, petitioner seeks to justify the broad sweep and lack of specificity in the warrant of inspection by analogy to the administrative inspection case of *Camara v. Municipal Court*, 387 U.S. 523 (1967). In *Camara*, this Court established three criteria for determining whether an administrative inspection might be conducted upon a showing of less than probable cause. Respondents submit that the applicable standard for judging the legality of the seizures conducted in this case is reasonable suspicion rather than probable cause, *Brignoni-Ponce, supra*. Yet, it is nevertheless instructive to determine whether the administrative inspection analogy is sufficiently compelling to justify a total emasculation of the reasonable

suspicion standard announced in *Brignoni-Ponce*, as petitioner urges.

In *Camara*, this Court held that administrative inspections designed to enforce building code regulations could be made with warrants issued on less than probable cause to believe that particular dwellings were the cites of particular violations. The factors that were cited in support of this conclusion were: (1) a long history[37] of judicial and public acceptance of the type of search, (2) the need to conduct the search in light of the *lack of alternatives* available, and (3) the *limited intrusiveness* of the search upon the individual's privacy by virtue of its nonpersonal nature and its administrative, as opposed to criminal, focus. *Id.* at 537.

The checkpoint stops and "routine inspections" contemplated by the warrant in this case fail to meet

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[37] See "Area Search Warrants in Border Zones: *Almeida-Sanchez* and *Camara*," 84 *Yale L.J.* 55, 61-362 (1974), where the author argues that the first time this Court was confronted with the question of the validity of a causeless immigration search, it was invalidated. By contrast, the practice involved in *Camara* had not only been accepted for more than 150 years, it also had been previously upheld by the Court in *Frank v. Maryland*, 359 U.S. 360 (1959). It was not until 1946 that Congress first enacted the precursor of 8 U.S.C. § 1357 which ostensibly gave immigration agents stop and search powers away from the border. *United States v. Bowen*, 500 F.2d 960, 983 (9th Cir. *en banc* 1974) (Hufstedler concurring and dissenting) reversed on other grounds 422 U.S. (1975). For other criticism of the area warrant concept, see *United States v. Barbera*, 514 F.2d 294 (2d Cir. 1975); Santana, "*Almeida-Sanchez* and its "Progeny: The Developing Border Zone Search Law," 17 Ariz.L.Rev. (1975); Note, "The Aftermath of *Almeida-Sanchez v. United States:* Automobile Searches For Aliens Take on a New Look," 10 *Cal.West.L.Rev.* 657 (1974).

all of the criteria suggested in *Camara*. The non-existence of an extensive history of judicial acceptance of immigration inspections well away from the border at inland checkpoints is obvious. The government is surely in no position to argue that there are no other effective means of stemming the tide of illegal immigrants.

The court below noted that intensification of the borderline watch is just one of many alternatives available to the government:

> The major forces that bring aliens to this country from Mexico are economic. Here they can get jobs, and jobs at higher wages than they can earn at home. At the same time, and because they are in this country illegally, they cannot complain about the working conditions or wages on the jobs that they obtain in this country. This produces an almost irresistible economic incentive to American employers to employ them. They are cheap and docile labor. We know that in many cases the terms and conditions under which they are employed are deplorable. In this respect, they compete, and compete unfairly, with American labor.[38] Congress could if it would, neutralize these forces by imposing sanctions on employers who hire an "illegal alien", [footnote omitted].

There are other actions that might be taken. The I-151, or "green card" program, and the I-186

[38]In June 1975, the International Labour Organization adopted Convention 143 and Recommendation 151 attempting to remedy the inadequacies or nonexistence of international provisions, including those found in former ILO Conventions, on many of the problems of migrant workers . . . The recent NGO Conference on Discrimination against Migrant Workers in Europe concluded that ratification and enforcement of this Convention would go a long way to remedying the most patent abuses which now exist with respect to migrant workers . . . .

Part I of the Convention contains a programme which, if carried into effect, would effectively eliminate the existence of a massive illegal work force of migrants. The application of

> "administrative, civil and penal sanctions, which include imprisonment in their range", would be required against those who organize the illegal entry of migrant workers or who employ illegal migrants (Art. 6). Employers must have the right to furnish proof of good faith in order to escape these sanctions. The ratifying States agree to undertake between themselves action including the prosecution of those who traffic in manpower notwithstanding the country from which they exercise their activity (Art. 6).

Russo, "Migrant Workers: Existing and Proposed International Action on Their Rights," 15 *The Review of the Int'l Comm. of Jurists* 51, 55-56 (Dec. 19, 1975).

temporary border pass card program could be eliminated. Congress could require that every alien entering from Mexico have a valid passport and entry visa. This might interrupt or reduce the extensive shopping the card holders now do in American border cities, but it is an alternative open to Congress if it finds the "illegal alien" problem as serious as government counsel tells us that it is.

> So, too, the Congress could abolish the alien "commuter system", which is an obvious subterfuge, that was before the Court in *Saxbe v. Bustos* [citations omitted]. We do not purport to have explored other possibilities. We mention the foregoing only because the government is here claiming "necessity" as a reason for abandoning constitutional protections. We are not persuaded by the government's argument that operation of the San Clemente checkpoint, and others like it, is the only way to deter the entry of "illegal aliens" from Mexico. *Martinez-Fuerte, supra,* at 319. See also Section IB, *supra.*

Similarly, the government conduct in operating the checkpoint in this case fails to meet the third criteria for the *Camara*-type administrative inspection in that the incidence of criminal prosecution resulting from the detection of an immigration violation is certainly substantial regardless of the government's declarations that its primary purpose in operating the checkpoints is to expel illegal immigrants. As the *Baca* hearings disclosed, while most of the illegal aliens detected at the checkpoints are simply deported, the government does prosecute virtually *all* persons suspected of smuggling these illegal entrants (B. Tr. 462-465). United States Magistrate Harry McCue testified in *Baca* to the existence of the optional felony-misdemeanor prosecutions in the Southern District of California for those charged with immigration offenses (B.Tr. 456-458).

A typical complaint is worded in two counts, one charging a violation of felony transportation of illegal aliens under 8 U.S.C. § 1324(a)(2) while the second count is a misdemeanor charging a violation of aiding and abetting the illegal entry of aliens under 18 U.S.C. § 2 and 8 U.S.C. § 1325 (B. Tr. 457). The purpose of

this type of complaint is to give the accused an opportunity to plead to a misdemeanor as soon as possible. Since all of the aliens located in a vehicle driven by an accused smuggler must be incarcerated to provide the defendant an opportunity to examine them for possible exculpatory evidence, this unique complaint procedure allows am accused to plead guilty to a misdemeanor and for the prompt release of the alien witnesses to Mexico. See *United States v. Mendez-Rodriguez,* 450 F.2d 1 (9th Cir. 1971) (B. Tr. 457). Magistrate McCue testified that all such cases could be prosecuted on a felony basis alone if the government so elected:

> I don't think there is any question about that. That all the defendants who are charged criminally, under the immigration laws, could have been charged with felony violations of the immigration laws. . . . (B. Tr. 458).

He also testified that the reason rather substantial jail terms are handed out to defendants in magistrate court is that the latter court is faced with processing felony alien smuggling cases on a misdemeanor level (B. Tr. 458).

When aliens are found in a vehicle at a checkpoint, the individuals in the vehicle are treated by the government as either criminal defendants or material witnesses (B. Tr. 464). The election whether to charge the individual as an illegal entrant, a smuggler, or a material witness detained for possible court testimony is that of the government (B. Tr. 464).

Magistrate McCue testified that two of the three full-time magistrates in the Southern District of California (excluding from consideration two part-time magistrates) handled in 1971 and 1972 about 7,000

immigration cases each year (B. Tr. 464). Virtually none of these prosecutions involved illegal entrant passengers of vehicles who were merely being transported or attempting to enter on foot (B. Tr. 464-465). Of the 7,000 prosecuted per year, approximately 40% were permanent resident aliens or citizens of the United States (B. Tr. 467). Of this group of individuals having a legal right to be here, the vast majority of the prosecutions for violations of immigration laws of necessity involved smuggling violations. Because the government usually does not choose to prosecute the simple illegal alien entrant, only those illegal aliens with an aggravated history of repeated entry or those who elect to drive other illegal aliens are prosecuted.

In sum, the prosecution pattern in the Southern District of California reveals thousands of prosecutions for smuggling violations. This prosecution scheme involves not only the arrest of the driver of a vehicle, but also the detention of the illegal aliens, who are incarcerated in the United States to insure the defendant and the government a fair trial (B. Tr. 470). The illegal alien entrant apprehended at a checkpoint is not invariably administratively processed and deported to Mexico. With the arrest of a smuggler for prosecution, all of the aliens must be held in custody as witnesses.

Moreover, the *Baca* record clearly demonstrated that Border Patrol officers of the Immigration and Naturalization Service are uniformed, armed law enforcement officers and not administrative officials (B. Tr. 255-156). Also, the hearings established that the INS frequently invites representatives from the Drug Enforcement Agency and Customs to join them at their checkpoints (B. Tr. 84-85).

In light of this substantial evidence of at least a dual administrative-criminal function of the checkpoint, it is clear that the checkpoint inspections do not meet the third prong of the *Camara test.*[39] The court below agrees:

> That the border patrol checkpoint operations are both personal in nature and aimed at the discovery of evidence of a crime is beyond dispute. Inherent in the government's argument here, and in its argument in *Almeida* (413 U.S. at 278, 93 S.Ct. 2535 (Powell, J., concurring)), is the fallacy that its practice of simply deporting aliens rather than prosecuting them gives its operations a quasi-administrative aspect. Although most aliens are simply deported, it is nonetheless true that the government does seek to prosecute virtually all smugglers of illegal aliens. *Baca*, R.T. 462-65. See *Baca, supra*, 368 F. Supp. at 406 ("particular attention" paid to smuggling operations). Furthermore, border patrol agents are armed with service revolvers. *Baca* R.T. 255, 289. They are law enforcement officers and cannot rationally be viewed as administrative personnel. *Id.* at 256. The very facts of the three appeals now before us attest to their criminal law enforcement duties and activities. The checkpoints perform primarily crime-investigative rather than administrative functions. *Martinez-Fuerte, supra*, at 320.

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[39]One commentator has suggested that a rule excluding the fruits of an administrative search from use in a criminal proceeding would give "substantial content to the non-prosecution criterion of *Camara* while allowing the government to achieve its stated purpose of excluding illegally entering aliens". Tribe, "*The Supreme Court, 1972 Term,*" 87 *Harvard L.R.* 1, 204 (1973).

C. EVEN ASSUMING THE ADMINISTRATIVE ANALYSIS IS APPROPRIATE TO STOPPING AND INTERROGATING PEOPLE NEAR THE BORDER AREA, THE SAN CLEMENTE CHECKPOINT CANNOT BE GOVERNED BY THIS RULE.

Respondents submit that even if Mr. Justice Powell's analogy to the field of administrative inspections is appropriate, the warrant issued in this case to justify the operation of the San Clemente checkpoint does not satisfy any of the requirements Justice Powell enumerated for the issuance of an area warrant.

In concluding that the *Camara*-type analysis was appropriate to the situation faced by the INS in the border areas, Justice Powell listed a number of relevant factors which should be considered in determining whether a warrant might issue for a specified area.[40] These factors were: "(i) the frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area; (ii) the proximity of the area in question to the border; (iii) the extensiveness and geographic characteristics of the area, including the roads therein and the extent of their use, and (iv) the probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area." *Almeida-Sanchez v. United States, supra,* at 283-284.

[40] As mentioned earlier, these four factors were not considered by the district court in the *Baca* hearing since that court did not reach the issue of the functional equivalence of probable cause. *Baca, supra,* at 415, n.3.

In analyzing the first factor enumerated by Justice Powell, the court below noted that the government's own statistics garnered from the return on the warrant of inspection negated its contention that the percentage of aliens utilizing the route on which the checkpoint is located was sufficiently high to qualify under this aspect of Mr. Justice Powell's analysis. The court found that "[d]uring the effective period of the warrant of inspection only 0.12% of the passing cars were found to contain 'illegal aliens'. Other considerations aside, that miniscule fraction alone would render the checkpoint operation unreasonable." *Martinez-Fuerte, supra,* at 321.

The government contends in its brief, however, that the Court of Appeal's analysis was faulty because the figure it arrived at was obtained by dividing the number of vehicles in which aliens were found by the total number that passed the checkpoint during its hours of operation. The figure is inaccurate, according to the government, because of the fact that only 820 of the 145,960 vehicles passing through the checkpoint were stopped *for questioning* (Brief for Pet. 53-54). However, petitioner's analysis fails to take into account the affect upon average motorists of armed Border Patrolmen standing on either side of a sign which clearly tells them to stop. The government counts as a "stop" of a vehicle a referral to the secondary inspection area at the checkpoint where a more detailed examination of the vehicle's occupants is conducted and questioning takes place. The primary "fleeting stop"[41] in the middle of the highway is completely ignored.

[41] In reading the government's definition of the word "stop," one is reminded of the teaching of Lewis G. Carroll's Humpty Dumpty, where he recites: "When *I* use a word, . . . it means just what I choose it to mean—neither more nor less." *The Annotated Alice, Through the Looking Glass,* 269 (Forum Books 1969).

No matter how one describes the checkpoint stop operation, the fact remains that only about one-tenth of 1% of the vehicles which are screened by this operation are found to contain illegal entrants. Even a utilization of the government's distorted analysis discloses that four out of five of the vehicles which are referred to the secondary inspection area for a more intensive inspection were found to contain no immigration law violators (Brief for Pet. 54). *Martinez-Fuerte, supra,* at 314.

The government asserts, nevertheless, that the statistics are not determininative "because there is no assurance that every vehicle containing illegal entrants was successfully stopped by the officers at the checkpoint" (Brief for Pet. 54). Even if this assertion were true, the government cannot be permitted to demonstrate satisfaction of the requirements of one of Justice Powell's prerequisites by reference to nothing more than sheer speculation. Mr. Justice Powell referred to the frequency with which aliens are "known or reasonably believed" to be transported, not the frequency with which government officials subjectively suspect that are transported within a particular area.

The second and third requirements for the issuance of a valid area warrant enunciated by Justice Powell – the proximity of the area in question to the border and the extensiveness and geographic characteristics of the area including the roads therein and the extent of their use – overlap to a considerable extent. Initially, however, it should be noted that the particular checkpoint which is the subject of this warrant is located 66 miles from the international border with Mexico. The Court of Appeals in noting this fact determined that in listing proximity as a relevant factor, Justice Powell must have envisioned inspections which

physically took place much closer to the border. *Martinez-Fuerte, supra,* at 321. This conclusion is bolstered by reference to the testimony given by Mr. Charles Gordon, former General Counsel for the Immigration and Naturalization Service, before the House Subcommittee on Immigration, Citizenship, and International Law on July 26, 1973. Mr. Gordon related that he believed "the majority of the court has endorsed [the] concept of an area search warrant in an area where there is strong suspicion that aliens are being smuggled in, like a back road near the border."[42]

Justice Powell's opinion itself supports the correctness of this analysis. His explanation of the related factor of the geographical characteristics of the area in question contains examples of the type of area which he anticipated would be the proper subject of an area warrant:

> Depending upon the circumstances, there may be probable cause for the search to be authorized only for a designated portion of a particular road or such cause may exist for a designated area which may contain one or more roads or tracks. Particularly along much of the Mexican border, there are vast areas of uninhabited desert and arid land which are traversed by few, if any, main roads or highways, but which nevertheless may afford opportunities – by virtue of their isolated character – for the smuggling of aliens. 413 U.S. at 284, n. 4.

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[42] *Hearings before the Subcommittee on Immigration, Citizenship, and International Law of the Committee on the Judiciary of the House of Representatives,* 93d Cong., 1st Sess., 22 (1973).

The Court of Appeals correctly concluded, based upon this statement, that geographic characteristics are relevant only to establish an essential nexus with the border which nexus is patently lacking in the case of the San Clemente checkpoint. *Martinez-Fuerte, supra,* at 322.

The petitioner, however, completely ignores this statement of intent contained in Justice Powell's opinion and asserts that the San Clemente checkpoint fits the mold envisioned in the concurring opinion in *Almeida-Sanchez* because "geographic considerations and the fraudulent use of border crossing identification cards make it necessary to place most checkpoints, including the San Clemente checkpoint, at least 25 miles from the border [citations omitted]" (Brief for Pet. 55). As has been previously mentioned, the government states elsewhere in its brief that aliens who enter lawfully with valid border crossing documents and later violate the terms of their entry constitute an insignificant proportion of the total number of illegal entrants (less than four percent) (Brief for Pet. 28). In the face of this statement, the government can only prevail on this aspect of the analysis if it can demonstrate that the checkpoint is as close to the border as possible given the topography of the area. Petitioner does not attempt to make such a showing but rather reverts to the argument that it would be too inconvenient and expensive to check traffic on the roads closer to the border area. (Brief for Pet. 56-57). These considerations, demonstrated spurious, *supra,* are not sufficient justification for dispensing with the rights of the general populace to "free passage without interruption or search. . . ." *Carroll v. United States,* 267 U.S. 132, 154 (1925). Moreover, evidence introduced in the *Baca* hearings belies the petitioner's

contention that placing the checkpoint nearer to the border would pose insurmountable traffic problems. Defense Exhibit C, introduced by the defense in *Baca,* indicates that the traffic flow north in the area closest to the border is low, but as the roads proceed north, the volume of traffic greatly increases.[43] *Cf., Baca, supra,* at 411. Moreover, while the checkpoint is not open on a 24-hour a day, seven days a week basis, it is nevertheless true that the overwhelming majority of the vehicles subjected to the traffic inspection program at the checkpoint contain completely innocent members of the traveling public who have not ventured near the border.

Many of the aforementioned considerations apply with equal force to a proper resolution the fourth factor in Justice Powell's formulation, the probable degree of interference with the rights of innocent persons. It bears repeating, however, that while the figures relied upon by the court of appeals in determining the percentage of the traffic passing the checkpoint attributable to immigration violators may not accurately reflect their total proportion because of the ineffectiveness of the apprehension effort, it is not disputed that these violators constitute a very small proportion of those subjected to violations of their constitutional rights. Indeed, the ineffectiveness of this apprehension technique strongly and persuasively in-

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[43] Attached as Appendix C to this brief is a graphic demonstration of the Exhibit showing that more volume of traffic passes San Clemente than crosses the border 66 miles to the south. Of course, there is no reason to believe that the border traffic, or any part thereof, proceeds on to San Clemente. (*Cf.,* Brief for Pet. 50).

dicates that this Court should not strain the bounds of the Fourth Amendment in order to accommodate the San Clemente checkpoint.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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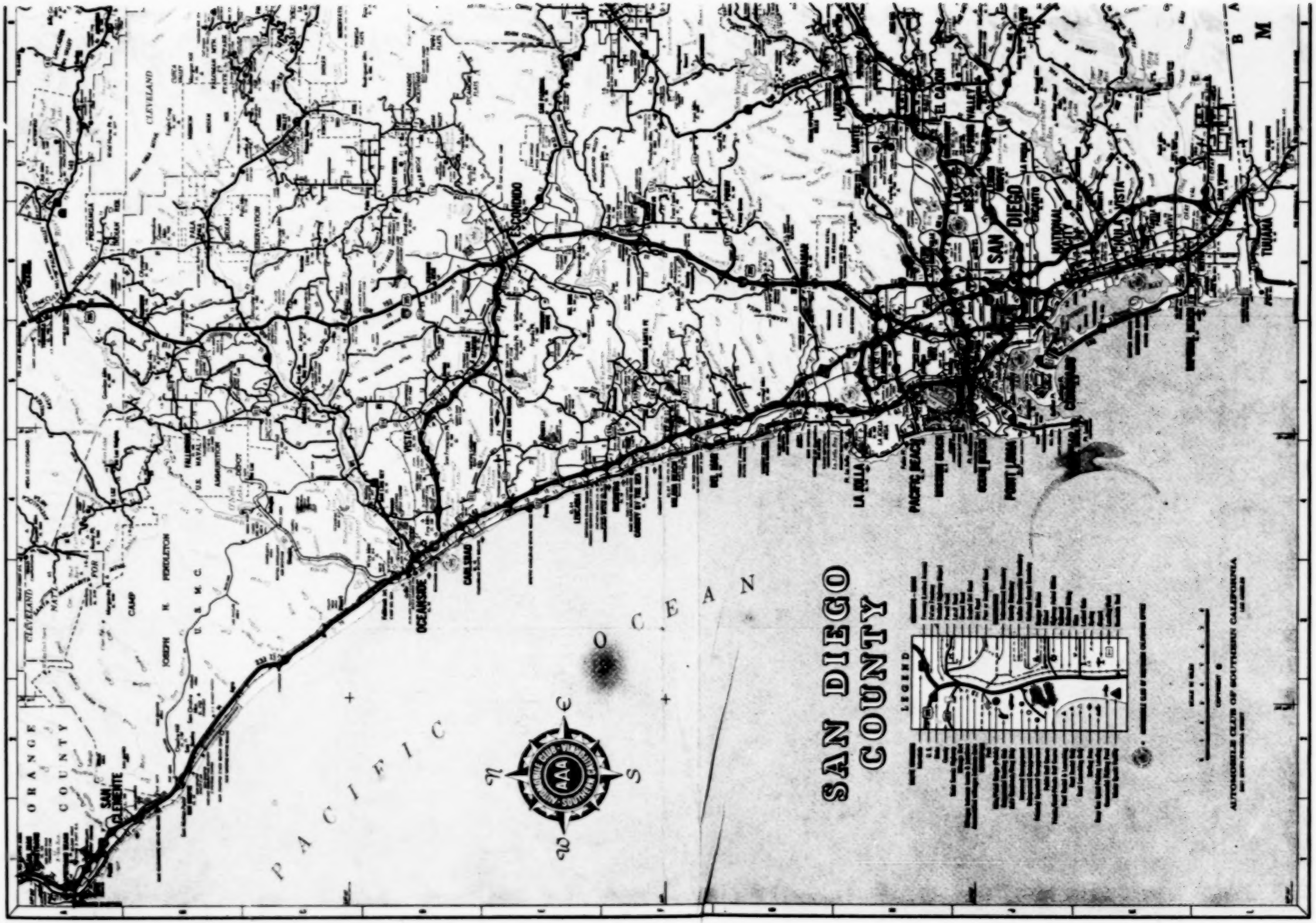
APPENDIX A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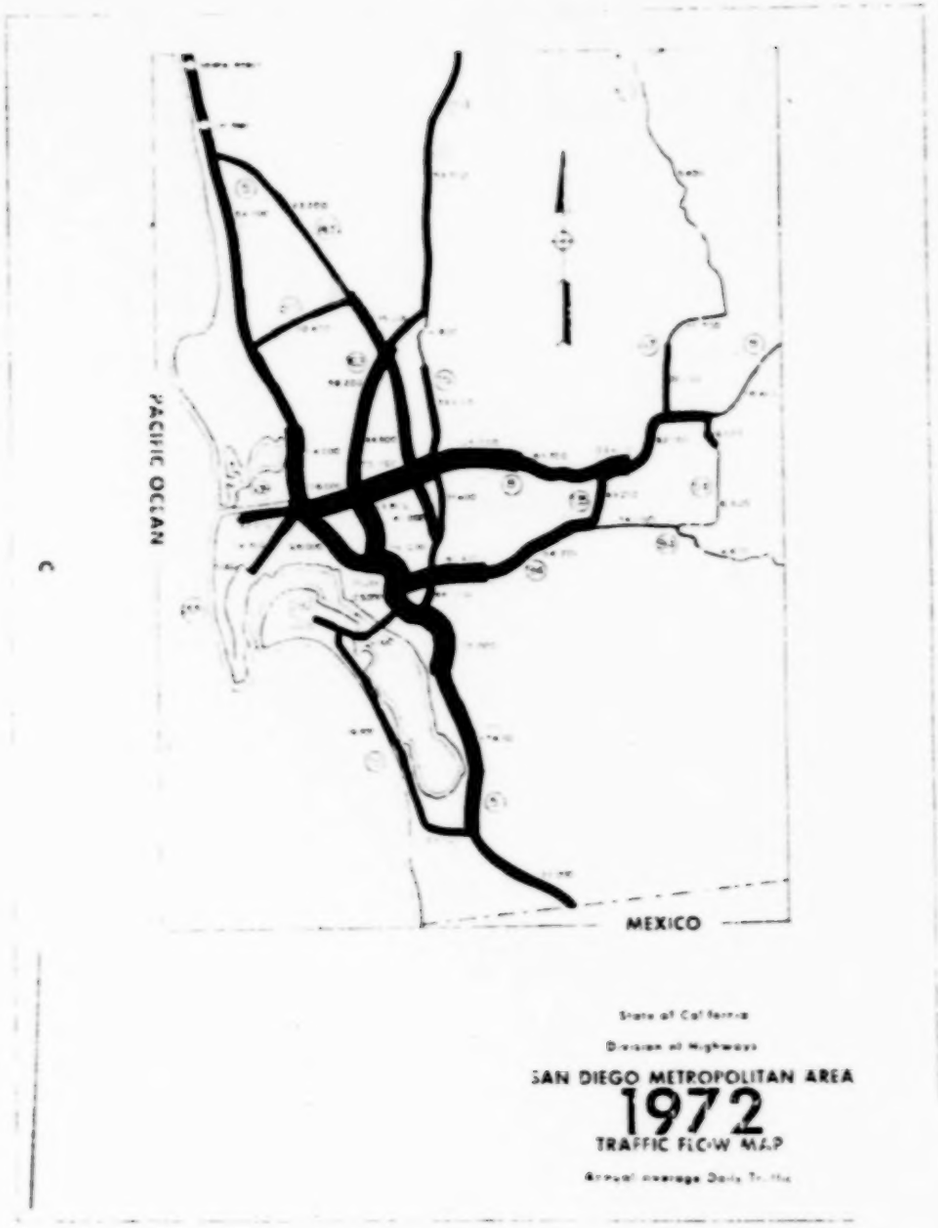
ORANGE COUNTY
CLEVELAND
CAMP JOSEPH H. PENDLETON
U.S.M.C.
FALLBROOK NAVAL WEAPONS STATION
CORONADO
OCEANSIDE
CARLSBAD
SAN CLEMENTE
SAN DIEGO
LA MESA
PACIFIC BEACH
MISSION BAY
MISSION VALLEY
POINT LOMA
NATIONAL CITY
CHULA VISTA
IMPERIAL BEACH
TIJUANA
MEXICO
LEGEND
AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA

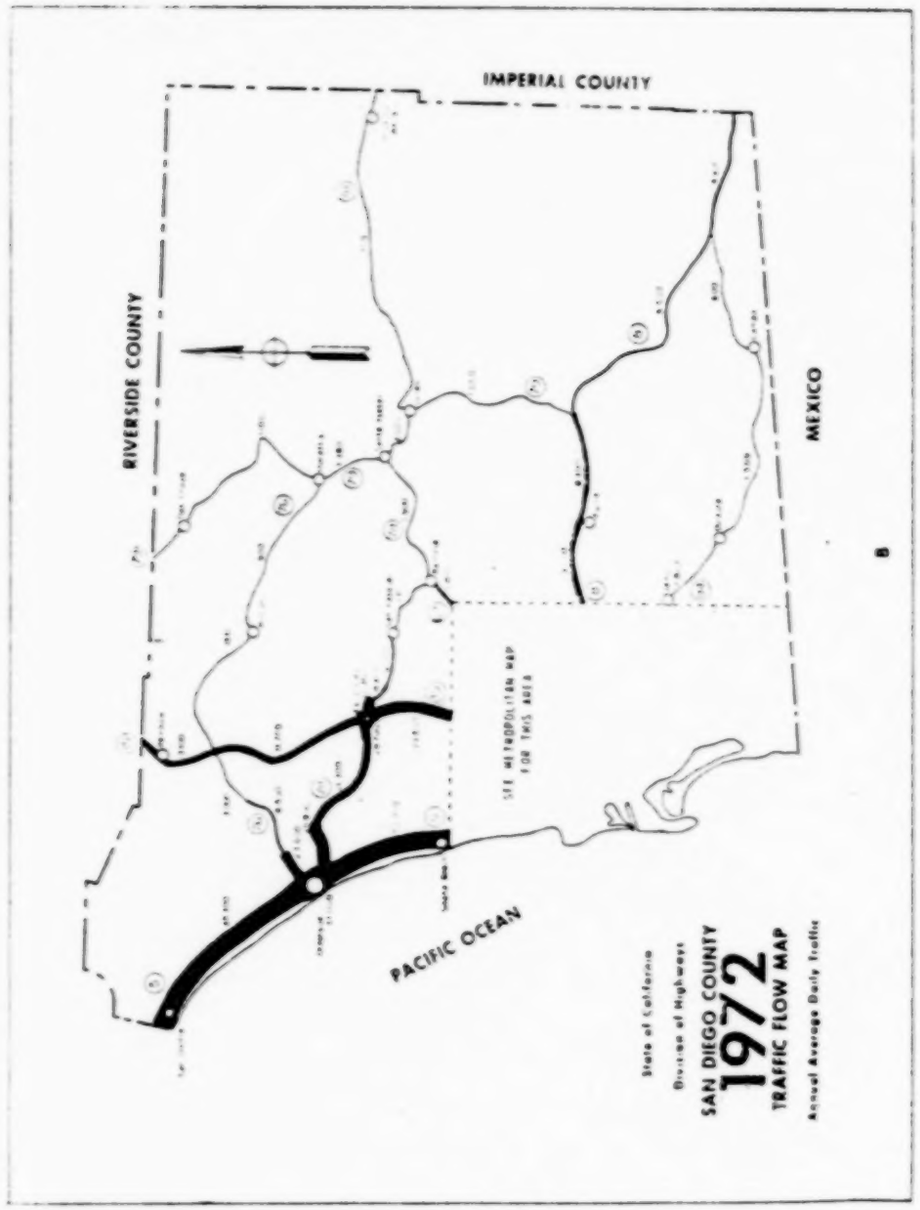
APPENDIX B

	1761 PAXTON'S WRIT	1974 WARRANT
PURPOSE:	DISCOVERY OF UNDUTIED GOODS ENTERING PORT OF BOSTON	DISCOVERY OF VIOLATIONS OF TITLE 8 USC 1 - 1357
PERSONS AFFECTED:	PERSONS ENGAGED IN COMMERCE IN PORT OF BOSTON	ALL MOTOR TRAFFIC PROCEEDING NORTH ON INTERSTATE 5 (10,000,000 CARS PER YEAR)
ACTION AUTHORIZED:	TO SEARCH VESSELS, BUILDINGS CONTAINERS FOR GOODS IN PORT AREA	TO STOP, INQUIRE, AND MAKE ROUTINE INSPECTIONS OF ALL CARS TRAVELING NORTH ON INTERSTATE 5
LIMITATIONS:	SEARCHES OF TRUNKS, ETC., MUST BE BASED UPON SUSPICION GOODS EXIST THEREIN	NONE (EXCEPT INSPECTIONS MUST BE "ROUTINE")
AREA:	BORDER (PORT OF BOSTON)	68 MILES NORTH OF BORDER NEAR SAN CLEMENTE, CALIFORNIA
TIME:	DAYTIME ONLY SEARCHES ON LAND OR BUILDING; DAY OR NIGHT FOR VESSEL SEARCHES	OPERATIONS AUTHORIZED CONTINUOUSLY SINCE 22 JUNE 1974 DAY OR NIGHT
FOCUS:	UNDUTIED MERCHANDISE	A CLASS OF HUMAN BEINGS

APPENDIX C



APPENDIX C-1



Supreme Court, U. S.
FILED
JAN 5 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1560

UNITED STATES OF AMERICA,
Petitioner,

vs.

AMADO MARTINEZ-FUERTE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of the American Civil Liberties Union, the Mexican American Legal Defense and Educational Fund, and the Northern California Police Practices Project, as *Amici Curiae*

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UNITED STATES COMMISSION ON CIVIL RIGHTS, REPORT: THE MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST (G.P.O. 1970) 17

IN THE

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No. 74-1560

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On Writ of Certiorari to the United States Court

of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND THE NORTHERN CALIFORNIA POLICE PRACTICES PROJECT, as AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nation-wide, non-partisan, non-profit membership organization dedicated to securing the constitutional rights of all persons. For more than fifty years, the ACLU has engaged in litigation and education which seeks to insure that all agents and agencies of government are governed by the rule of law, and that official arbitrariness touching the liberty of a free people will be restrained and curbed. The ACLU's interest in the present cases is based upon the belief that random stops of private moving vehicles for the detection of criminal suspects cannot be reconciled with Fourth Amendment limitations on arbitrary police practices.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national, non-partisan, non-profit organization established in 1968 to secure and advance the civil rights of Mexican Americans through litigation and education. The principal locus of MALDEF's activities is in the American Southwest, above the border with Mexico, from California to Texas, where the predominate share of American citizens of Mexican ancestry and lawfully admitted aliens live and work. Since its inception MALDEF has actively presented legal challenges to many indignities faced by Mexican Americans and has been particularly concerned with the treatment of Mexican Americans by police officials in connection with the enforcement of the immigration laws. Last Term MALDEF participated in the presentation of United States v. Brignoni-Ponce, ___U.S. ___, 45 L.Ed 2d 607 (1975), United States v. Ortiz, ___U.S. ___,

45 L.Ed 2d 623 (1975), Bowen v. United States, ___U.S. ___, 45 L.Ed 2d 641 (1975), and United States v. Peltier, ___U.S. ___, 45 L.Ed 2d 374 (1975), by filing a brief as amicus curiae.

MALDEF's interest in these cases arises for two reasons. First, its experience has demonstrated the deep and pervasive effect that random stops of persons of Mexican racial appearance have on the lives and spirits of America's Mexican-American population. Second, it believes that these cases provide a significant opportunity for the Court to resolve the principal remaining issues arising at immigration checks removed from the international border, and to insure that Mexican Americans are treated impartially in the enforcement of the immigration laws.

The Northern California Police Practices Project is a non-partisan, non-profit organization established in the San Francisco Bay Area of California in 1973 with the objective of developing adequate public accountability of police agencies and personnel. The Project's work has focused upon the extent to which the discretion of police officials is regulated under law. The Project's interest in these cases arises because their resolution may determine the extent to which the legal process will effectively regulate police discretion to briefly, though intrusively, detain innocent persons in the course of detecting criminal suspects outside the international border context.

SUMMARY OF ARGUMENT

1. In each of the consolidated criminal cases before the Court, officials of the United States Border Patrol detained moving vehicles at a fixed immigration traffic checkpoint located between San Diego and Los Angeles, California, without probable cause or a founded suspicion connecting the occupants of the vehicles with immigration law violations. In each case the defendants were seized pursuant to a warrant of inspection issued by a magistrate, authorizing routine, random vehicle stops at the checkpoint. Measuring the random checkpoint practice and the warrant against constitutional proscriptions of unreasonable seizures, the Court of Appeals held the warrant invalid and found the practices it authorized in violation of the Fourth Amendment. That decision is entirely consistent with the antecedent history of the Fourth Amendment warrant clause and serves to protect all innocent travelers from frightening, arbitrary, and discriminatory law enforcement.

2. Causeless, random detentions of United States citizens and lawfully resident aliens at a fixed immigration traffic checkpoint which is neither located at an international boundary or its functional equivalent violates "[t]he right of the people to be secure in their persons, . . . against unreasonable searches and seizures . . . ." Causeless, random vehicle stops, unfounded by a reasonable suspicion to believe that occupants of the vehicles stopped are engaged in a criminal enterprise, are a wholesale intrusion on the security and privacy of law abiding motorists. Such a practice cannot be countenanced

in a society which values its democratic ideals, and requires that before government may restrain a person's movements on the highways of this land, it must be able to articulate and demonstrate that particular grounds exist justifying the restraint as to the person stopped. This standard insures that the government will focus on the person's conduct, rather than his physical appearance, status in society, or his location in an areal setting, before a forcible stop will take place. The Government's position in this case is unacceptable because it would suspend the restraint's against random intrusions by officials in the field which were previously enunciated by the Court during its last Term.

3. The warrant of inspection issued in this case -- like all such warrants -- did not and could not practically distinguish the practice at the San Clemente, California, checkpoint from the practices engaged in at any other fixed checkpoint operated by the Border Patrol without a warrant. The warrant of inspection was a form without substance; it licensed discretion rather than curbed discretion. Its approval would signal an extravagant license to intercept innocent persons on the chance of finding that they are engaged in crime.

4. Reasonable suspicion for a particular vehicle stop at a fixed checkpoint adequately accommodates the Government's needs and presents objective standards which protect the law abiding public from arbitrary intrusions on security and privacy.

ARGUMENT

I. INTRODUCTION

"Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'" Davis v. Mississippi, 394 U.S. 721, 726-727 (1969). Last Term the Court held that "officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." United States v. Brignoni-Ponce, ___U.S. ___, 45 L.Ed 2d 607, 618 (1975). In United States v. Ortiz, ___U.S. ___, 45 L.Ed 2d 623 (1975), the Court also held that the probable cause standard imposed in Almeida-Sanchez v. United States, 413 U.S. 266 (1973) in connection with roving patrol searches near the border likewise applies to searches made at a fixed checkpoint. Now in this case, the Government urges that the Brignoni-Ponce "reasonable suspicion" standard does not apply to forcible investigatory stops at fixed checkpoints, and, alternatively, that such stops are constitutionally validated by a blanket warrant authorizing the stop of any vehicle passing through the San Clemente checkpoint which the Border Patrol, in its unfettered discretion, may choose to detain for questioning about illegal immigration activities. The Court of Appeals defined the "issue here . . . [as] whether the warrant of inspection somehow transforms otherwise unreasonable seizures into constitutional ones." 514 F.2d at 315

(footnote omitted). The Court held that it does not. 1/

The issue is of considerable significance. "The Border Patrol operates 17 permanent and 30 temporary checkpoints in California, Arizona, New Mexico, and Texas, within the jurisdiction of six different federal judicial districts." 2/ These checkpoints include the one at San Clemente, California, at issue here, "where traffic is heavy", 3/ and also, "infrequently used temporary checkpoint[s]". 4/ The Government's

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1/ Although the Court of Appeals apparently thought that both the initial "fleeting stop" (which in most instances was not a stop at all but rather involves a slow down of cars), see 514 F.2d at 315; and the subsequent, discretionary, random diversion for questioning were unconstitutional (see 514 F.2d at 311, n. 3), this case does not require resolution of the question of whether the "fleeting" stop (or slowdown) standing alone is a "seizure" subject to Fourth Amendment standards. For that reason, we focus our attention in this Brief upon the diversion for questioning, which unquestionably is a seizure within the meaning of the Fourth Amendment, as Brignoni-Ponce squarely held.

2/ Brief for Petitioner at 39.

3/ Id. at 21.

4/ Id. at 41. The checkpoint locations are fixed by the Border Patrol, and can be opened or closed at will. They are not fixed by an Act of Congress, or by binding, published administrative regulations of the Attorney General. United States v. Baca, 368 F. Supp. 398, 406 (S.D. Cal. 1973).

position rests on the assertion that "in order for a checkpoint to pose a meaningful risk of detection for even the most carefully disguised professional smuggling operations, some stops must be made on an essentially random basis." (Brief for Petitioner at 12, emphasis added.) And in these consolidated cases it is conceded that Border Patrol officers who stopped the respondents did not have "traditional probable cause or reasonable suspicion, in the sense of specific knowledge about the particular car stopped." Brief for Petitioner at 8.

As amici our joint concern is primarily two-fold: first is the pronounced effect that arbitrary stops can and will have on innocent persons of Mexican physical appearance, and lawfully admitted resident aliens, as well as all other traveling residents of the border areas where random stops are made; 5/ and second is "a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens," United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297, 312 (1972), especially persons of Mexican ancestry who must travel through the presently established 47 checkpoints of the Southwest. 6/ It is the "indiscrimi-

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5/ "Roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well." United States v. Brignoni-Ponce, supra, 45 L.Ed 2d at 617.

6/ "Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens." United States v. Brignoni-Ponce, supra, 45 L.Ed 2d at 619.

nate official interference" 7/ of the checkpoint stop and inquiry practice, which was legitimated by the "warrant of inspection" 8/ that presents the need for special vigilance. 9/ For the arbitrary stops of traveling motorists in this case touch at "the unrestrained search for smuggled goods that brought the Fourth Amendment into being." J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 57 (Johns Hopkins University Studies in Historical and Political Science, Serv. 84, No. 1, 1966) [hereinafter cited as LANDYNSKI].

We believe that neither the fixed checkpoint nor the warrant of inspection issued in this case sufficiently restrain the indiscriminate character of the stop and inquiry practiced by the Border Patrol at these checkpoints. Its validation can be effected only by substantially eroding previously established objective standards for police stops in the Border context, an erosion which will have a serious impact on the degree of randomness tolerated in other high crime areas and situations. Accordingly, we believe that a free society cannot afford to relax the limitation of "reasonable suspicion" for a forcible stop in areas

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7/ United States v. Brignoni-Ponce, supra, ___, 45 L.Ed 2d 607, 617 (1975).

8/ Appendix at 52-53.

9/ "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these procedures that counsels a resolute loyalty to constitutional safeguards." Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973). See also Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971).

removed from an international border or its functional equivalent. Nor does the Constitution itself permit the courts to issue warrants which allow the decision as to whom to stop to be made by law enforcement officers in the field without any restraints. The Fourth Amendment stands as a barrier to what was done here. It unambiguously prohibits general warrants, and requires that "warrants particuarly describ[e] the place to be searched, and the persons or things to be seized."

II. STOPS AT FIXED CHECKPOINTS REMOVED FROM THE INTERNATIONAL BORDER OR ITS FUNCTIONAL EQUIVALENT REQUIRE REASONABLE SUSPICION DIRECTED TO THE PERSONS AND AUTOMOBILES DETAINED; RANDOM STOPS ARE UNCONSTITUIONAL.

The automobiles stopped at San Clemente and at other relatively fixed border checkpoints are not empty. They are carrying people. A predominate purpose of the Fourth Amendment is to protect those persons, and their interests. Katz v. United States, 389 U.S. 347 (1967). "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." Id. at 359. While a search at a fixed checkpoint entails a relatively greater invasion of privacy than a stop, the stop is not free from the restraint of reasonableness that can be measured against an objective standard. "[W]henever a police officer accosts an individual and restrains his freedom to . . . [drive] away, he has 'seized' that person" within the meaning of the Fourth Amendment. Terry v. Ohio, 392 U.S. 1, 16 (1968). Thus this Court held in United States v. Brignoni-Ponce,

supra, that the Border Patrol "must have a reasonable suspicion to justify roving patrol stops." 45 L.Ed 2d at 617.

The Government argues that, Brignoni-Ponce notwithstanding, forcible stops and interrogations at fixed checkpoints (as distinguished from those imposed by roving patrols) are so trivial an invasion of privacy that a foundation of reasonable suspicion need not be present. The claim, particularly in light of the Court's analysis in Brignoni-Ponce, must be rejected.

The forcible stop of a moving car is an unambiguous restraint -- even more so than detentions of immobile persons who may be stationary and then approached by a policeman for any reason ranging from a brief greeting to an abrupt pat down search for weapons. Those stationary detentions are, of course, subject to Fourth Amendment reasonableness requirements. See Adams v. Williams, 407 U.S. 143 (1972); Sibron v. New York, 392 U.S. 40 (1968). It is preposterous to argue that stops of moving automobiles by "'a Border Patrol agent in full dress uniform, standing behind a white and red "STOP" sign'" accompanied by "'official U.S. Border Patrol vehicles with flashing red lights'" (United States v. Martinez-Fuerte, 514 F.2d 308, 313 (9th Cir. 1975), quoting United States v. Baca, 368 F. Supp. 398, 411 (S.D. Cal. 1973), are not significantly different from "the interuption caused by a traffic light or a stop sign." Brief for Petitioner at 31 (and id. at 12).

Millions of cars pass through the San Clemente checkpoint every year; it is the principal wide-lane thoroughfare connecting San Diego to Los Angeles, continuing all the way to Washington State. As the Court of Appeals observed, "[t]he overwhelming majority of persons traveling north through the checkpoint are lawfully within the

country; indeed, most of them are not aliens and have not crossed the border at all." 514 F.2d at 312. The embarrassment and attending apprehension of motorists singled out for the stop and inquiry procedure -- that is, "divert[ed] . . . to a secondary inspection area where the travelers will be detained for inquiry by other agents into their citizenship and immigration status" (514 F.2d at 313) -- is not difficult to picture.

A motorist and his passengers seeing some vehicles being singled out to the secondary inspection area, watching some cars being "inspected" 10/ or searched, has no way of knowing what is about to happen to him. He sees the official uniforms, the guns (see 514 F.2d at 320) and the flashing red lights. One unfamiliar with the procedure, upon being selected for interrogation -- and seeing most other cars continue on their way -- would reasonably think and fear, "Why have I been singled out?" "What did I do wrong?" "Will I be arrested?" "Will I be held for a long time?" "Will they take apart my car?" "Perhaps I shouldn't drive on Highway 5 because what is happening will probably happen again." And once Brignoni-Ponce's restriction on stops solely based on the visible Mexican appearance of suspects is relaxed, it is not difficult to imagine the offensive result: the fear and distress of all persons with noticeable Mexican physical characteristics would be further exacerbated upon seeing countless persons of "Mexican appearance"

10/ We have put the word inspected in quotes because the Government implies that inspections are not searches, although the Court of Appeals was unable to figure out what kinds of actions this parlance actually addressed. 514 F.2d at 313.

detained at the side of the highway. The practice will "inflict great indignity and arouse strong resentment." Terry v. Ohio, 392 U.S. 1, 17 (1968). 11/

Whether the vehicle is merely stopped, or also "inspected" or searched is no comfort, in the first instance, to the thousands of innocent motorists who could be hailed to the side of the highway. The initial embarrassment, apprehension, and humiliation at the time the stop occurs is great. Those consequences, the Government concedes, were imposed upon the occupants of 12,007 vehicles during a nine-month period at the San Clemente checkpoint -- more than three-fourths of whom were found to be wholly innocent of immigration law violations. 12/ It was for precisely these reasons that the Court in Brignoni-Ponce rejected the Government's claimed right to stop and question without reasonable suspicion, and wholly on the basis of the visible ancestry of a suspect, in the context of roving patrols; the intrusion upon privacy and security at a fixed checkpoint is of the same order.

"[T]he broad and unlimited discretion sought by the Government" (United States v. Brignoni-Ponce, supra, 45 L.Ed 2d at 617)

11/ The Government variously describes the duration of the stop and inquiry practice as detentions "for only a few minutes" (Brief for Petitioner at 16), "no more than about five seconds per occupant", (id. at 29), "ordinarily less than a minute", (id. at 31), and "the average time consumed by a stop for questioning at San Clemente is still only three to five minutes (A. [at] 46)" (id. at 53).

12/ Brief for Petitioner at 21.

is a major and compelling reason why "checkpoint investigative stops without search, will be difficult to justify under the Fourth Amendment absent probable cause or reasonable suspicion." United States v. Ortiz, supra, 45 L.Ed 2d at 639 (Justice White dissenting).

It is a discretion which is admittedly exercised without identifiable standards by Border Patrol officers. Who gets stopped at San Clemente, and why they get stopped, was decided in each of these consolidated cases solely by the Border Patrol officer surveying and directing traffic at the checkpoint concededly without probable cause or reasonable suspicion. See Brief for Petitioner at 8.

Like other seizures, investigative stops may not constitutionally be made "in the discretion of the police" (Beck v. Ohio, 379 U.S. 89, 97 (1964)), for "unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy. . . ." United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297, 317 (1972). 13/ The lesson of United States v. Ortiz is clear: the Fourth Amendment is meant to "protect . . . privacy from official arbitrariness." 45 L.Ed 2d at 629. 14/

13/ We deal in this section of the Brief with the Government's claim that no warrant is required in the checkpoint setting for forcible stops. In Part III, infra, we show that the impermissible discretion in selecting those cars for stops is no less intolerable where, as here, a general "area" warrant was issued.

14/ See following page 15 for footnote.

A seizure of the person is arbitrary when it is unsupported and unlimited by "articulable grounds for identifying violators." United States v. Brignoni-Ponce, supra, 45 L.Ed 2d at 617. That is grounds which can be explained and which distinguish the suspected violator from the general law-abiding public. "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." Terry v. Ohio, 392 U.S. 1, 21 n. 18 (1968). While "reasonable suspicion" involves a lowered degree of probability than "probable cause" the focus of the probability -- that is that the particular person or persons stopped is involved in some criminal enterprise -- remains the same. Randomness plays no role when the standard used requires a connection between the person stopped and the suspected commission of a particular crime, and when that standard requires articulation of the factors which form the grounds for a particular forcible detention.

Unchecked, wholly discretionary vehicle stops "would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention." Davis v. Mississippi, 394 U.S. 721, 726 (1969). This Court found that kind of unfettered discretion constitutionally offensive in Ortiz, noting that the Government's position in that case "would authorize the Border Patrol to search vehicles at random for

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14/ See Camara v. Municipal Court, 387 U.S. 523, 528 (1967). And see generally, Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 396, 411-412, 417, 472 n. 549 (1974).

no officer ever would have to justify his decision to search a particular car." United United States v. Ortiz, supra, 45 L.Ed 2d at 628-629. Under the scheme whose constitutionality is asserted by the Government here, the law enforcement officers' decisions cannot be rationally explained in a manner that assures a detained motorist that his having been ordered to the side of a highway is based upon lawful criteria. 15/ Further the decision is not subject to the restraint of the rule of law; it lacks specific, reasoned objective criteria altogether.

The ignominy attending the random stop of an innocent person of visible Mexican appearance is particularly acute. He can refrain from having anything to do with illegal alien traffic, he can drive carefully, he can conform to all the outward attributes of American life, but he cannot change his physical appearance. "[E]ven though the intrusion incident to a stop is modest", 16/ in the absence of restraints on the discretion of the Border Patrol, its officials could stop "all Mexican-Americans to ask if they are aliens." United States v. Brignoni-Ponce, supra, 45 L.Ed 2d at 620. That is a burden which cannot be tolerated in a free society, where Mexican-Americans, like other ethnic and racial groups have sought to enter the mainstream of America with the security

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15/ "[A]n officer, left to function on his own, understandably tends to respond to a given situation on the basis of his personal norms regarding individual group behavior." Goldstein, Police Policy Formulation: A Proposal for Improving Police Performance, 65 MICH. L. REV. 1123, 1128 (1967).

16/ United States v. Brignoni-Ponce, supra, 45 L.Ed 2d at 615.

and rights enjoyed by other Americans. 17/

The Government, however, asserts two principal reasons for upholding the random stop and inquiry procedure at San Clemente. First is the contention that Border Patrol officers at the checkpoint cannot sufficiently view an approaching vehicle in order to determine in all cases whether reasonable suspicion exists for stopping a particular vehicle. 18/ That is a curious and frightening argument, for it implies that constitutional safeguards are subject to be discarded when they cannot easily be met. Second is the asserted need to deter potential professional illegal alien smugglers by informing them of the capability to make random, causeless stops. 19/ The same was, of course, true of the stops and searches condemned in Almeida-Sanchez, Brignoni-Ponce, and Ortiz.

At the bottom of all this, however, is the Government's submission that "the unique law enforcement problem justifies an unconventional solution." Brief for Petitioner at 14-15. As amici we are particularly concerned about the creation of "unconventional" inroads on the traditional limitations on

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17/ UNITED STATES COMMISSION ON CIVIL RIGHTS, REPORT: MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST (G.P.O. 1970); A. MORALES, ANDO SANGRANDO -- A STUDY OF MEXICAN AMERICAN POLICE CONFLICT (Perspectiva Publications Press)(1972). And see, e.g., Keyes v. School District No. 1, Denver, 413 U.S. 189 (1973); White v. Regester, 412 U.S. 755 (1973); Hernandez v. Texas, 347 U.S. 475 (1954); United States v. Mallides, 473 F.2d 859 (9th Cir. 1973).

18/ Brief for Petitioners at 21-24.

19/ Id. at 24-25.

the propriety of governmental conduct. It is not necessary to deprecate the serious governmental concerns urged in this case to reject the invitation to water-down the settled Fourth Amendment barrier against detention of an individual for questioning about matters concerning possible criminal law violations except upon probable cause, or at least, reasonable suspicion. Society's need to apprehend smugglers, although significant, is precisely the sort of conventional concern from which the Fourth Amendment was born. See Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971); Berger v. New York, 388 U.S. 41, 58 (1967); Stanford v. Texas, 379 U.S. 476, 481-486 (1965); Henry v. United States, 361 U.S. 98, 100-101 (1959); Boyd v. United States, 116 U.S. 616, 624-630 (1886). 20/ Stopping cars, without cause, and without limitation, in the interior United States, for such purposes presents an unwarranted regimentation of American life which should not be countenanced merely on principles of expediency.

20/ Ever since Lord Camden decided in Entick v. Carrington, 19 Howell St. Tr. 1029 (1765), that "[t]he mere need to solve crimes . . . did not allow the law to place its own enforcement above other values," LANDYNSKI, supra, p. 9, at 59-60, the Court has resisted such blandishments in Fourth Amendment cases, e.g., United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297, 318-321 (1972); Coolidge v. New Hampshire, 403 U.S. 443, 445, 454-455 (1971). One commentator has noted that in border area cases "the government always presents its case as one of great need." Note, Area Search Warrants in Border Zones, 84 YALE L. REV. 355, 371 (1974).

It is genuinely appropriate to ask how a rule such as that contended for by the Government here can possibly remain confined to checkpoint border stops. If law enforcement officers may randomly detain vehicles and their occupants in their search for illegal aliens at a fixed checkpoint 66 road miles north of the border, may they randomly stop and interrogate (and, presumably pat-search under Terry v. Ohio, supra) in so-called "high crime" areas? May they stop, question and administer tests for intoxication to drivers randomly stopped on a Saturday night? Could shoppers walking or driving in the downtown shopping district during a wave of shoplifting be detained randomly and asked to produce evidence that they paid for the merchandise in their possession? See p. 29, infra, at note 28 . And if the answer is that under Brignoni-Ponce they may not, would (and should) the result be different if the stops are performed at a fixed checkpoint, flashing red lights and all? The requirement of individualized suspicion as a predicate for detention has heretofore stood as a barrier to such overreaching conduct even though law-breaking which might have been identified through its use may go undetected.

In any event, the Government's concern that "a requirement of reasonable suspicion would be unworkable at a checkpoint (Brief for Petitioner at 26) is highly conjectural in light of this Court's finding that "the nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators." United States v. Brignoni-Ponce, supra, 45 L.Ed 2d at 617. What is interesting about the Government's position is that it says that the way things are done at the checkpoint -- the way the "point" officer screens the traffic -- is somehow immutable, and there are no alter-

native methods of screening traffic. The Border Patrol has not even attempted to adjust its checkpoint operational practices to the recently imposed reasonable suspicion standard. 21/ Surely, the constitutional requirement of reasonable suspicion should not be scrapped simply because the Government does not wish to put that standard into practice at a checkpoint by rethinking the manner in which vehicles are selected for stops. Modification of the existing set-up at the checkpoints, by increased usage of spotter patrols before the checkpoint, or moving patrols after the checkpoints, is a constitutionally more acceptable solution than wholesale, random intrusions on the security and privacy of travelers with visible Mexican characteristics, and all other innocent motorists.

21/ See Brief for Petitioner at 24-25:

> "After the Ninth Circuit's decision in the present case, in effect imposing a reasonable suspicion requirement for checkpoint stops, and in light of the Ninth Circuit's rulings on the contours of the 'founded suspicion' concept . . ., the Border Patrol felt it had little choice but to abandon most checkpoint operations in California and Arizona." (Footnote omitted.)

Both the Fifth and Tenth Circuits have refused to impose the reasonable suspicion standard at checkpoints. So the Government has had no need to try it in those circuits. United States v. Santibanez, 517 F.2d 922 (5th Cir. 1975); Sifuentes v. United States, cert. granted, No. 75-5387, Nov. 11, 1975; United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973).

The deterrence rationale -- that is, that "[t]he checkpoint acts as a powerful deterrent to illegal entry and transportation of aliens" 22/ -- is true of any overreaching law enforcement tool. The problem is that checkpoints, like other forms of unlimited surveillance power, take the good with the bad, the innocent as well as the suspicious, the vacationing motorist and the professional smuggler. Three-fourths of the motorists detained at San Clemente, in a nine month period prior to the warrant, the Government acknowledges, were not found to be in violation of the immigration laws. Brief for Petitioner at 21. And only about one-fifth of the cars stopped under the warrant of inspection contained deportable aliens. Appendix at 55. For persons of Mexican appearance, the burdens of this process are obviously disproportionate. For them especially, but for other persons as well, "[t]he price of lawful . . . [use of the highways] must not be a dread of subjection to an unchecked surveillance power." United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297, 314 (1972). The number of innocent motorists who would be stopped simply because their visible appearance and conduct resembles that of a well-practiced professional smuggler -- that is, whose conduct appears wholly innocuous and lawful -- is too high a price to pay.

Our society could apprehend more miscreants, and deter potential ones, by imposing checkpoints, dragnets, and arbitrary stops of the public to detect crime, but such a regime would change our society as we know it today. See, Brinegar v. United States, 338 U.S. 160, 180-181 (1949) (Jus-

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22/ Brief for Petitioner at 16.

tice Jackson dissenting). Moreover, in the context of vehicle stops at fixed checkpoints, some illegal aliens will slip through even the most comprehensive sieve that the Government can feasibly impose. See Brief for Petitioner at 11-12, 14, 20, 41-42, 54-55. The benefit to the Government of increasing the surveillance authority to make random stops is at best marginal; the intrusion on the privacy and security of all travelers would be immeasurable.

III. THE WARRANT OF INSPECTION WAS UNLAWFUL AND DOES NOT VALIDATE A FORCIBLE DETENTION FOR QUESTIONING MADE WITHOUT REASONABLE SUSPICION

In the preceding portion of this Brief we have focused on the causeless, random stops of particular motorists at checkpoints removed from the international border or its functional equivalent. The Government argues that these stops can be validated by a warrant. We are not here concerned with the theoretical basis for the warrant requirement generally, since it is the time-tested constitutional means of insuring that searches and seizures are based upon appropriate factual prerequisites, and it confines otherwise unchecked law enforcement discretion. We are concerned, however, with the practical consequence of a warrant of the type issued in this case. And we are concerned about the unlimited abuse of potentially similar warrants that could issue in non-border contexts to seek out law violators, if warrants of the sort involved in this case, which do not focus on particularized circumstances, should receive the Court's approval.

It is useful to recall that the "hated writs of assistance", Stanford v. Texas, 379 U.S. 476, 481 (1965) -- warrants issued to intercept smuggled goods in the American Colonies 23/ -- helped to kindle the American revolution and led to the creation of the constitutional limitation that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." "The warrant clause of the Fourth Amendment is not dead language." United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297, 315 (1972).

The writs of assistance had an uncanny resemblance to the "warrant of inspection" that is at issue in this case; both were meant to intercept smugglers. The primary lession of the history of the writs and succeeding decisions of the Court is that while the warrant is "an important working part of our machinery of government," United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297, 316 (1972), the mere issuance of a warrant does not necessarily avoid impermissible invasions of that privacy protected by the Fourth Amendment. Indeed, a warrant may not authorize that which the constitution prohibits. See, e.g., Berger v. New York, supra; Stanford v. Texas, supra; Marcus v. Search Warrant, 367 U.S. 476 (1965). Cf. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Aguilar v. Texas, 378 U.S. 108 (1964); Giordenello v. United States, 357 U.S. 480

23/ See LANDYNSKI, supra, p. 9 , at 32-38; Dickerson, Writs of Assistance as a Cause of the Revolution, in R. Morris (ed.), THE ERA OF THE AMERICAN REVOLUTION 40-75 (1939); and text at p. 18, supra.

(1958). The issuance of the warrant of inspection in this case fails -- as do all such warrants -- to prevent the abuses that the Fourth Amendment restrains.

First, the issuance of the warrant of inspection for the San Clemente checkpoint did not curb the abuses inherent in the fixed checkpoint operations that we addressed in the previous section of this Brief. The situs of the checkpoint was fixed by the warrant, but it otherwise provides no standards and imposed no limitations. Who would be stopped and who would not was wholly left to "the discretion of the official in the field." Camara v. Municipal Court, 387 U.S. 523, 532 (1967). See United States v. Ortiz, supra, 45 L.Ed 2d at 628. Nor did it sufficiently serve to prevent random stops based solely on the visible Mexican physical appearance of law abiding motorists. With the exception of the tabulation of statistical information required by the return to the San Clemente warrant, its practical effects did not differ from other fixed checkpoints operated by the Border Patrol.

"The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Marron v. United States, 275 U.S. 192, 196 (1927). See also Berger v. New York, 388 U.S. 41, 58 (1967); Stanford v. Texas, 379 U.S. 476, 485 (1965). The "demand for specificity" (Terry v. Ohio, 392 U.S. 1, 21, n. 18 (1968)) 24/ should not

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24/ See Beck v. Ohio, 379 U.S. 89, 97 (1964).

and cannot be abandoned in the context of vehicle stops at fixed checkpoints. "[T]he notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context." Id. at 20.

The warrant of inspection issued in this case was evidence of a policy determination by a magistrate that the situs at San Clemente is appropriate for screening moving vehicles; but the warrant is so unspecific in content that its practical consequences are readily ambiguous. While a motorist who is detained might learn after being stopped that the enforcement of the immigration statutes at that location has been approved by a magistrate, he gets little comfort since he is the one who is stopped and questioned, unlike most other motorists who are free to go on their way. And he gets no assurance that the stop of his car was not based on inappropriate factors, or that he will not be stopped, without cause, over again in the immediate future. He does not know whether the warrant prevents "routine" harassment each and every time he travels from San Diego to Los Angeles by car. Nor does he know whether the warrant even governs the regularity of the routine. 25/

Second, this warrant of inspection was not suitably restricted either in terms of the procedures to be used in its execu-

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25/ It is difficult to imagine that a warrant that is renewed 26 times, (see 514 F.2d at 312) containing wholly ambiguous language, authorizing the stops of thousands of cars, "involved the appropriate limiting circumstances" envisioned by Mr. Justice Powell in this concurring opinion in Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973).

tion, or in ensuring that an appropriate return to it could adequately check illegal abuses. In the nature of things it could not have been otherwise. The warrant commanded Border Patrol officers "to stop northbound motor vehicles for the purpose of making routine inquiries to determine the nationality and/or immigration status of the occupants of said vehicles" and "to conduct a routine inspection of said vehicles for the presence of aliens," Appendix at 52-53. 26/

26/ The initial problem is with the word "routine." The term may imply continuation of habitual practices; but on this record it does not appear to incorporate "reasonable legislative standards for conducting an area inspection", Camara v. Municipal Court, 387 U.S. 523, 538 (1967); it provides no guidance for objective reference to insure uniformity of compliance by all officers, at all times of the day or night; nor does it require that "the stop and inquiry must be 'reasonably related in scope to the justification for their initiation.' [Terry v. Ohio,] 392 U.S., at 29". United States v. Brignoni-Ponce, supra, 45 L.Ed 2d at 617. It does not insure the regularity of "routine" established by law. Indeed, the warrant could be used as a "passkey" for generalized inquiries and "inspections" and searches, see Berger v. New York, 388 U.S. 41, 57 (1967), and as a means of institutionalizing harassment of some individuals. The warrant authorizes what was disallowed in Brignoni-Ponce.

The secondary problem is with the word "inspection." Although this term was deleted from the text of the 25 renewals of the warrant, preceding the Ninth Circuit's deci-

Footnote continued.

The lack of any limiting means of checking against the warrant is illustrated by the return to the warrant. The return, see Appendix at 54-58, tells nothing about how the officers performed their functions. The magistrate did learn that only 171 of 820 vehicles stopped in 124 hours and 10 minutes had "aliens" in them. He learned that 202 vehicles were "inspected." Appen-

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Footnote 26 continued.

sion in this case (514 F.2d at 311, n. 3), it illustrates the ambiguity of the actual warrant used to intercept the respondents in this case, and to detain 649 innocent vehicles in 124 hours and 10 minutes. See Appendix at 57. The Government admits that "it was not clear whether 'inspection' was intended to imply 'search', and in any event the Border Patrol did not conduct routine searches of the interior of vehicles." (Brief for Petitioner at 43, n.14, emphasis added). Clearly, the term "inspection" as understood by the Border Patrol means something more than "plain view" perusal of a car, since the interior passenger compartment of most cars stopped would be in plain view, and only 202 of 820 cars stopped were "inspected." If the Government, along with the Court of Appeals (see 514 F.2d at 313) could not understand what this vague term did authorize, it gives little protection to the innocent motorist who could be, and was, subjected to its vague terms. See Appendix at 54-58.

In essence, there is no assurance in this warrant, or on this record, that motorists "who may be mistaken for aliens" United States v. Brignoni-Ponce, supra, 45 L.Ed 2d at 618, will know what is authorized by it, or that an officer's decisions and practices can be governed by it or checked against it.

dix at 57. But the Magistrate did not learn what caused the stops in the first place: whether persons of Mexican appearance were being singled out for no apparent reason except their appearance, nor whether any other impermissible criteria served as the sole basis for a stop. It is plain that these aspects were not dealt with because the Magistrate accepted the Government's view that these concerns are constitutionally irrelevant. Hence, the Magistrate had no control over what was going on at San Clemente.

Lord Mansfield summed up this evil in Leach v. Three of the King's Messengers, 19 Howell St. Tr. 1001, 1027 (1765) -- as recently quoted by the Court 27/ when he pronounced:

> "'It is not fit,' . . .'that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer.'"

"In short, the . . . [warrant's] blanket grant of permission to [stop and inspect] . . . is without adequate judicial supervision or protective procedures." Berger v. New York, 388 U.S. 41, 60 (1967). It "leaves too much to the discretion of the officer executing the order." Id. at 59.

27/ United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297, 316 (1972).

These are not insignificant concerns where millions of cars pass the checkpoint in a year, and thousands pass through in a week. When literally millions of discretionary decisions are being made it is inconceivable that the Constitution does nothing to control those decisions, or even provide standards for their review. But a warrant that authorizes detention or "inspection" of all persons in an area, or who pass by a single point, cannot do otherwise.

Third, approval of warrants of inspection could signal an extravagant license for stopping vehicles and pedestrians, without probable cause or reasonable suspicion, without "facts . . . judged against an objective standard," Terry v. Ohio, 392 U.S. 1, 21-22 (1968), which would enable effective judicial supervision, in other Border related contexts, as well as high crime areas of urban cities. 28/ This warrant issued on the premise that there was "probable cause to believe that mass violations of the Immigration laws . . . have been and are being committed" at the San Clemente checkpoint. Appendix at 52. The checkpoint itself is 66 road miles from the Border. But there is no discernable means of limiting inspection warrants to the presently existing checkpoints in the American Southwest which are not functional equivalents of the border. Forty-seven checkpoints could become 50 or 100; warrants could be issued for points 800 miles from the border (see United States v. Grando, 453 F.2d 769 (10th Cir. 1972); United States v. Saldana, 453 F.2d 352 (10th Cir. 1972)), or on bus lines near the Border with Canada (see United States v. Barbera, 514 F.2d 294 (2nd Cir. 1975)), or for San Francisco's Chinatown or New York's Little Italy, (see United States v. Karathanos, 399 F. Supp. 185 (E.D. N.Y. 1975)) so long as there was reason to believe that "massive" immigration violations were occurring.

28/ "For example, in a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant is 'reasonable' only when there is 'probable cause' to believe they will be uncovered in a particular dwelling." Camara v. Municipal Court, 387 U.S. 523, 535 (1967). See, e.g., Henry v. United States, 361 U.S. 98, 104 (1959); Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966).

Moreover, under the principles urged by the Government to justify this warrant local law enforcement officials could get areal warrants, or class warrants, or road warrants, or neighborhood warrants to intercept the movements of suspected criminals in previously established high crime areas. "The fact that innocent activity occurs in a high crime area provides no basis for converting innocuous conduct into suspicious activity." Chapman and Kane, Illegal Aliens and Enforcement: Present Practices and Proposed Legislation, 8 U. CALIF., DAVIS L. REV. 127, 142 (1975). Although the character of the area is relevant to the inferences that may be drawn from information about a particular individual's conduct, compare, Adams v. Williams, 407 U.S. 143, 147-148 (1972), with Sibron v. New York, 392 U.S. 40, 62 (1968), blanket warrants would undue previous protections vouchsafed to innocent individuals who live, work, or travel through high crime areas. Cf. Papachristou v. City of Jacksonville, 405 U.S. 156, 159 (1972). Giving this kind of sweeping discretion to the police

-- even under a warrant -- "would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law." Johnson v. United States, 333 U.S. 10, 17 (1948).

We recognize, of course, that Justice Powell's concurring opinion in Almeida-Sanchez suggested the possibility of a constitutionally valid warrant authorizing the search of all vehicles found within a particular area. While for all the reasons just stated we respectfully disagree with that suggestion, that question need not necessarily be reached, for as the Court of Appeals concluded, "the San Clemente checkpoint does not meet the standards sketched by Justice Powell. . . ." 514 F.2d at 321. In context, the area warrant proposed in Justice Powell's opinion contemplated a location much nearer the border than San Clemente and one which, either because of its remoteness or other factors, would be unlikely to see large numbers of innocent persons swept into the net. See 413 U.S. at 284, n. 4. At the San Clemente checkpoint, at least three-fourths of the vehicles detained are not found to be involved in immigration law violations. The invasion of the privacy of all these innocent persons seems far more sweeping than anything contemplated by Justice Powell's original suggestion.

It is urged that Camara v. Municipal Court, 387 U.S. 523 (1967) validates warrants of the type issued in this case. In Camara, the Court overruled its earlier holding in Frank v. Maryland, 359 U.S. 360 (1959) in which it had held that administrative inspections made for the purpose of determining whether urban housing met health, fire and other code standards did not require a warrant. The Court held that a warrant was required, but concluded that

if consent is refused the search warrant can issue without a showing of probable cause that the particular dwelling is in violation of the housing code. For several reasons, Camara is not controlling.

First, Camara did not (as is sometimes suggested) hold that an area warrant can be issued. Camara contemplated, quite to the contrary, that a warrant would not issue until there had been a request for entry 29/ and a consideration of the individualized circumstances of the proposed search. The magistrate must focus on whether "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." Id. at 538 (emphasis added). In this way there is prior judicial consideration of "whether enforcement of the municipal code involved requires inspection . . . of [the individual] premises, . . . the lawful limits of the inspector's power to search, and . . . whether the inspector himself is acting under proper authorization." Id. at 532. Camara is thus consistent with the express command of the Fourth Amendment that warrants "particularly describ[e] the place to be searched, and the persons . . . to be seized." Warrants of the type issued here cannot satisfy that unambiguous constitutional standard. In contrast, the warrant here authorized the seizure of all persons, within the Border Patrol's absolute and uncontrolled discretion, who pass by the checkpoint.

29/ "Thus, as a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry." Camara v. Municipal Court, supra, 387 U.S. at 539-540.

Second, Camara condemned the very discretion which this warrant conferred. As the Court there said of the system of searches before it: "The practical effect . . . is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested third party warrant the need to search." Id. at 532.

Third, the procedures used here are part of the mechanism by which criminal laws are enforced. It is true, of course, that many aliens are simply deported, for prosecution of each violation detected would clog the federal courts. But the matters under investigation are no less criminal; moreover, as the Court of Appeals noted, "the government does seek to prosecute virtually all smugglers of illegal aliens." 514 F.2d at 320. Indeed, this very case is a criminal prosecution, as were those which have preceded it in this Court. That is entirely different from the civil, code-compliance procedures which were at the heart of Camara. While criminal prosecution in some instances might have been available, that plainly was not the thrust of the municipal procedures with which the Court was concerned. To the contrary, the entire thrust of the search there was to detect health and safety hazards which might well not even be known to the occupant of the dwelling. As the Court said in Camara, "such conditions . . . indeed may not be apparent to the inexpert occupant himself." 387 U.S. at 537. For that reason, Camara-type inspections "are neither personal in nature [30/] nor aimed

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30/ The Court's characterization of the search as not "personal in nature" is a further point of distinction. There the ob-

Footnote continued.

at the discovery of evidence of crime." (id.).

Plainly, the warrant of inspection in this case could not substitute for the constitutional and practical restraint imposed by a reasonable suspicion standard which can be used in the situation at San Clemente, where law enforcement decisions to stop a motorist must be made under exigent circumstances, leaving no time to obtain a traditional warrant for the particular car to be stopped. This "approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity" of the Fourth Amendment warrant clause. Camara v. Municipal Court, supra, 387 U.S. at 539. This approach prevents the abuses proscribed by Brignoni-Ponce.

Footnote 30/continued.

ject of the search was a dwelling; here the object was the detection of persons engaged in illegal conduct.

CONCLUSION

"[A] requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference." United States v. Brignoni-Ponce, supra, 45 L.Ed 2d at 617. The checkpoint fails to limit "to any meaningful extent the officer's discretion to select cars," United States v. Ortiz, supra, 45 L.Ed 2d at 628 (1975). The authorization of the warrant of inspection to "stop every automobile on the chance of finding" an illegal alien in it is "intolerable and unreasonable," Carroll v. United States, 267 U.S. 132, 153-154 (1925).

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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SANFORD J. ROSEN
JEROME B. FALK, JR.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of January, A.D. 1976.

MOTION FILED

JAN 30 1976

IN THE

Supreme Court of the United States

October Term 1975
No. 74-1560

UNITED STATES OF AMERICA,

Petitioner,

vs.

AMADO MARTINEZ-FUERTE, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Motion to File Brief of Amicus Curiae and Brief of Amicus Curiae.

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IN THE

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October Term 1975
No. 74-1560

UNITED STATES OF AMERICA,

Petitioner,

vs.

AMADO MARTINEZ-FUERTE, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Motion for Leave to File Brief as Amicus Curiae.

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States, the Los Angeles County Bar Association hereby moves this honorable Court to grant leave to file the accompanying Brief of an Amicus Curiae. This Motion for Leave of Court is necessary because this moving party has not obtained consent for the filing of said brief as contemplated by the said Rule of this Court. Pursuant to leave of the Ninth Circuit Court of Appeals, the Los Angeles County Bar Association filed its Amicus Curiae Brief with that Court.

1. *Interest of the Appellant.* The present petition involves the United States District Court's refusal to exclude evidence obtained under the color of a general "Warrant of Inspection." Said "Warrant of Inspection"

was an apparent attempt to avoid the recent decisions of the United States Supreme Court and United States Circuit Court of Appeals for the Ninth Circuit, which consistently have held that searches in the absence of probable cause or founded suspicion are not constitutionally permissible.

The Los Angeles County Bar Association is vitally interested in the fair administration of justice. In the present action, the evidence establishes that in excess of 145,960 persons, (99.9% who were apparently either U.S. citizens or legal resident aliens), were slowed or detained, briefly or otherwise, from 4 P.M. on June 22, 1974, to 4 P.M. on June 30, 1974, as they proceeded northbound on Interstate 5 at the San Clemente checkpoint pursuant to a "Warrant of Inspection" issued on June 22, 1974, by U.S. Magistrate Edward Infante. Interstate 5 is the most heavily travelled artery between San Diego and Los Angeles, and the overwhelming majority of persons regularly interfered with are residents of Los Angeles County. As a result of the "Warrant of Inspection" the rights of many residing in or travelling to the Los Angeles area were adversely affected. Believing that attorneys individually and Bar Associations generally have an obligation to uphold constitutional principles and owe fidelity to public duty, and that a substantial interest of those it serves will be positively benefited, the Los Angeles County Bar Association seeks to uphold this obligation through its appearance in this case as Amicus Curiae.

2. *Need for an Amicus Brief.* In the present appeal the Federal Public Defender, on behalf of the Respondent, presents very learned and compelling arguments attacking the concept of general area search warrants.

The Government in support of the concept has adopted a novel and alarming theory equating need with probable cause. The Los Angeles County Bar Association wishes in its Brief to demonstrate more clearly that even if such a concept existed, which it does not, the Government failed to demonstrate such a need. The Court of Appeals for the Ninth Circuit, upon motion, granted leave to the Los Angeles County Bar Association to file its Brief and argument below. It is believed that the statistical perspective not fully presented by the other parties herein was instrumental to the favorable decision of the Ninth Circuit, as it would be for this Court.

3. *Late Application.* The Brief of the Petitioner United States was received by the offices of the Los Angeles County Bar Association on or about December 9, 1975. Since the Association is a voluntary bar association it has no staff attorneys, but only designated voluntary private counsel for specific cases of public interest. Inasmuch as the undersigned is the counsel in the present case, and was out of the United States from December 9, 1975, until January 6, 1976, the Amicus Curiae Brief could not be filed at the time of filing of the Brief for Respondent on or about December 31, 1975, as required by Rule 42(2).

Because of the importance of the case, it is respectfully submitted that this Court receive guidance and assistance from sources beyond the summary decision of the District Court and the briefs submitted on behalf of the parties to the appeal. The instant Amicus Brief is aimed at providing such assistance.

Wherefore, the Los Angeles County Bar Association respectfully requests leave to file the accompanying Amicus Curiae Brief.

Dated: January 29, 1976.

Respectfully submitted,

LOS ANGELES COUNTY BAR ASSOCIATION,

By ROBERT L. MILLER,

Attorney for Amicus Curiae.

Affidavit of Robert L. Miller in Support of Motion for Leave to File Brief as Amicus Curiae.

State of California, County of Los Angeles—ss.

Robert L. Miller, being first duly sworn, deposes and says:

1. I have been authorized by the Board of Trustees of the Los Angeles County Bar Association to prepare and file this Amicus Curiae Brief on its behalf in the instant case. I am Chairman of its Immigration Committee.

2. I have read the contents of the Motion for Leave to File Brief as Amicus Curiae. I hereby verify, to the best of my knowledge, information and belief, that the information stated in the motion is true and correct. Sworn and Subscribed to before me this 29th day of January, 1976.

ROBERT L. MILLER,
LOS ANGELES COUNTY BAR ASSOCIATION,
Attorney for Amicus Curiae.

IN THE

Supreme Court of the United States

October Term 1975
No. 74-1560

UNITED STATES OF AMERICA,

Petitioner,

vs.

AMADO MARTINEZ-FUERTE, *et al.*,

Respondents.

Brief of Amicus Curiae Los Angeles County Bar Association.

I.
STATEMENT OF QUESTIONS PRESENTED.

Did the trial court err by denying the respondent's motion to suppress the evidence derived from the cause-less stop and detention of defendant's vehicle at the San Clemente, California checkpoint in holding it legal under the inspection warrant issued by a United States Magistrate?

II.
STATEMENT OF THE CASE.

A. Nature of the Case.

This Petition arises from the criminal conviction of the Defendant-Respondent, Amado Martinez-Fuerte (denominated herein defendant), following a jury trial in the United States District Court for the Southern District of California, Honorable Howard B. Turrentine, Judge Presiding, which was reversed by the Court of Appeals for the Ninth Circuit (514 F.2d 308).

B. Statement of Proceedings.

On July 2, 1974, the defendant was charged in a five count indictment with inducing the entry of and the transportation of two illegal aliens and conspiracy to commit those offenses. 8 U.S.C. § 1324(a)(2) and (4).

In a pre-trial proceeding, the defendant through his attorney moved for the suppression of evidence obtained as a result of the stop of the defendant by Border Patrol Officers at San Clemente basing the motion on lack of probable cause, founded suspicion or a valid warrant. The government stipulated in connection with this motion that the stop of the defendant at the checkpoint was based entirely upon the inspection warrant issued by the United States Magistrate. Following a hearing in chambers, the Court denied the defendant's motion without opinion (A. 28).

The case proceeded to jury trial on July 10, 1974, and resulted in a finding of guilty on the two counts charging the defendant with illegal transportation of aliens.

On July 11, 1974, the defendant was sentenced to a term of three years on both counts to run concurrently, suspended on condition that defendant spend six months in a jail-type institution (A. 42). On July 11, 1974, a Notice of Appeal was filed. On March 5, 1975, the Court of Appeals for the Ninth Circuit reversed the conviction (514 F.2d 308), (Pet. App. 1a-43a). Representing the defendant then and now is Charles M. Sevilla, Chief Trial Attorney, Federal Defenders of San Diego, Inc.

III.
STATEMENT OF FACTS.

On June 22, 1974, a "Warrant of Inspection" (A. 52-53) was issued by Magistrate Edward A. Infante of the United States District Court, Southern District of California, based on affidavits submitted by the United States Border Patrol (A. 45-51). The warrant authorized the operation of a Border Patrol checkpoint for a period of ten days on the northbound lanes of Interstate Route 5 about five miles south of San Clemente and 68 miles north of the Mexican Border, approximately half-way between San Diego and Los Angeles, California.

The warrant was based on the magistrate's finding that "mass violations of the Immigration laws of the United States" were occurring at the checkpoint. It authorized Border Patrol officers to "stop northbound motor vehicles for the purpose of making routine inquiries to determine the nationality and/or immigration status of the occupants of such vehicle," and "to conduct a routine inspection of said vehicles for the presence of aliens." (A. 52-53).

The defendant's car was stopped at the checkpoint on the afternoon of June 24, 1974, pursuant to the warrant. His car was directed to a secondary position off the highway where the defendant and his two female passengers were interrogated about their right to be in the United States. After the passengers admitted being illegally in the country the defendant was arrested.

At trial the two passengers, by this time material witnesses, testified that they had paid an unidentified man in Tijuana $200 to take them to Los Angeles. After obtaining false cards from him, they successfully

crossed the border and at San Ysidro, California, met the same unidentified man who provided them with bus tickets to San Diego. One of the witnesses testified that the defendant was with the man at San Ysidro. Later the unidentified man met them at the San Diego bus station and took them to the defendant's waiting car. The defendant then drove them north until they were stopped at the checkpoint.

IV.
ARGUMENT.

A. Under the Controlling Precedents in the Ninth Circuit, the San Clemente Border Patrol Checkpoint Is Operating in Clear Violation of the Fourth Amendment to the Constitution.

During recent months, this Court and the Ninth Circuit have repeatedly held that the traditional warrantless operation of such inland Border Patrol checkpoints as the one near San Clemente is an unconstitutional infringement on the Fourth Amendment's search and seizure safeguards,[1] and particularly that it is not located at a "functional equivalent" of the border as required for warrantless searches without probable cause by *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973). Rather, to stop a vehicle at such a checkpoint the Border Patrol must have "founded suspicion", and to search a vehicle there it must have probable cause under the holding of *United States v. Brignoni-Ponce,* and *United States v. Ortiz, supra.*

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[1]See, for instance, *United States v. Brignoni-Ponce,* No. 74-114, 422 U.S. ..... (1975); *United States v. Ortiz,* No. 73-2050, 422 U.S. ..... (1975); *United States v. Bowen,* 500 F.2d 960 (9th Cir. en banc, May 9, 1974), reversed on other grounds, 95 S.Ct. 2569 (1975).

In this case the Government contends that the operation of the San Clemente checkpoint on the day of defendant's arrest was lawful because of the existence of a "Warrant of Inspection" allowing the Patrol to stop all northbound vehicles on Interstate 5.

The warrant adds nothing to the legality of the Government's position. This point has been exhaustively briefed in the Brief for Respondent, which is herein incorporated by reference. It is mentioned here only for purposes of emphasis.

B. The Operation of the San Clemente Checkpoint at the Time of Defendant's Arrest Was Improperly Authorized by a General Area-Type Warrant Issued Not Only in Violation of the Fourth Amendment but Also in Violation of the Standards Suggested in the Almeida-Sanchez Dicta Relied Upon by the Government.

In its brief opposing the motion for the suppression of evidence obtained at San Clemente, the Government relied heavily on dicta in Justice Powell's concurring opinion in *Almeida-Sanchez,* (413 U.S. 266, 275-284 [1973]). However, the standards set forth by Justice Powell, even if acceptable to a potential majority of the Supreme Court, were clearly unmet in the instant "Warrant of Inspection". Moreover, such a warrant has inherent Constitutional infirmities.

As noted by the defendant in his brief, our Constitutional and common law history is replete with instances in which non-specific search warrants were invalidated as violations of the Fourth Amendment's requirement that no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and

the persons or things to be seized. For discussion of the particularity requirement, see, for instance, *Carroll v. United States,* 267 U.S. 132 (1925), and *Boyd v. United States,* 116 U.S. 616 (1886).

In *Carroll,* the Supreme Court dealt with and rejected the argument that a compelling need of the government, (in that instance, for law enforcement tools to control the rampant violation of prohibition laws in the 1920's), justified a curtailment of traditional constitutional safeguards, an argument not unlike those the Government is now making in pointing to a serious general problem, *i.e.,* the silent invasion of illegal aliens from Mexico described in *United States v. Baca,* 368 F.Supp. 398 (U.S.D.C. So. District of California, 1973) and urging that the need for the traffic checkpoint to deal with this problem equates with probable cause.

In disposing of this sort of "ends-justify-the-means" rationale for infringements of Fourth Amendment rights, the majority in *Almeida-Sanchez, supra* at 273, pointed out that:

> "it is not enough to argue, as does the government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards."

Continuing, Justice Stewart wrote:

> "The court that decided *Carroll v. United States,* ante, sat during a period in our history when the nation was confronted with a law enforcement

problem of no small magnitude—the enforcement of the Prohibition laws. But that Court resisted the pressure of official expedience against the guarantee of the Fourth Amendment. Chief Justice Taft's opinion for the court *distinguished between searches at the border and in the interior, and clearly controls the case at bar:* (emphasis added)

> " '*It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and the indignity of such a search.* Travellers may be stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and has belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use public highways, *have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.*' " (*Almeida-Sanchez, supra* at 274, emphasis added.)

Justice Stewart conceded that *Carroll* and its progeny authorized searches of automobiles without warrants due to their unique mobility, but he emphatically reiterated that probable cause is a prerequisite for a lawful search of a motor vehicle:

> "*Carroll* has been followed in a line of subsequent cases, but the *Carroll* doctrine does not declare a field day for the police in searching automobiles.

> Automobile or no automobile, there must be probable cause for the search." (*Almeida-Sanchez, supra* at 269).

The traditional view of probable cause notwithstanding, the Government's reliance on Justice Powell's concurring opinion in *Almeida-Sanchez* and his discussion of a functional equivalent of probable cause as a basis for its "Warrant of Inspection" in the instant case appears to be badly misplaced.

For even if we assume that Justice Powell could muster a majority supporting his criteria for the issuance of "area warrants," the support for the warrant of inspection in the instant case fails to satisfy the requirements set forth by Justice Powell.

Justice Powell suggested four criteria to be used in determining whether an "area warrant" should be issued: (1) the frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area; (2) the proximity of the site to the border; (3) the extensiveness and geographic characteristics of the area, including the roads, and their use; and (4) the "probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area." *Almeida-Sanchez, supra* at 283, 284.

Even under these standards, the warrant issued in the instant case must fail.

First, the warrant fails to meet Justice Powell's standards in terms of proximity to the border and character of the area. Justice Powell's discussion makes

it clear he envisioned using such area warrants for surveillance along the border, in areas where many aliens are surreptitiously entering the United States by travelling overland. He makes reference to "tracks" (*i.e.* trails) and uninhabited desert areas, (*Almeida-Sanchez, supra* at 284. footnote 4). By no contrivance can it be argued that a point 68 miles north of the Mexican border on a major freeway between two large American metropolitan centers, a road used lawfully by some ten million motorists annually, (based on annualizing the figures supplied by Mr. Robert McCord of the Border Patrol in his affidavit seeking the "Warrant of Inspection" (A. 45-49)), is the kind of place Justice Powell considered suitable for an area warrant permitting the Border Patrol to stop all vehicles.

The Immigration Service appears to agree that an area warrant should be restricted to an area near the border. Charles Gordon, general counsel for the Immigration and Naturalization Service testified before the House Subcommittee on Immigration, Citizenship and International Law on July 26, 1973, and summarized his analysis of the *Almeida-Sanchez* decision by saying:

> "So in my opinion the majority of the court would uphold a search without a warrant based on probable cause and moreover even if it is necessary to get a warrant, the majority of the court has endorsed this concept of an area search warrant *in an area where there is strong suspicion that aliens are being smuggled in, like a back road near the border.*" (Quoted in 51 *Interpreter Releases* at 32, emphasis added).

Second, the instant case utterly fails to meet the fourth relevant factor suggested by Justice Powell. Using the data provided on July 1, 1974, by Mr. Gene Harris of the Border Patrol pursuant to the warrant's report-back requirements, (A. 53, 54), it is clear that the concentration of allegedly illegal aliens among the total population of highway users at San Clemente is minuscule.

The Border Patrol's data [Ex. A in Mr. Harris' statement] shows that of 145,960 vehicles passing through the checkpoint during the 124 hour period of operation, only 171 were found to contain "deportable aliens", or 0.12 percent of all vehicles passing through the checkpoint. In other words, the warrant authorized an infringement on the constitutional rights of nearly 99.9 per cent of the motorists who were travelling lawfully through the checkpoint in order to catch about the one tenth of one per cent who were alleged to be deportable aliens.

If that kind of conduct is NOT precisely the sort of "field day for the police in searching automobiles" castigated by the majority in *Almeida-Sanchez, supra* at 269, it is difficult to imagine what sort of conduct would now constitute a "field day."

The overwhelming majority of persons travelling north on Interstate 5 during this period were subjected to the annoyance of this police action without any basis whatever other than the fact that they chose to exercise their well-established right to travel between two major cities via the main highway artery linking the two.

In summary, the use of general or area search warrants raises constitutional problems of the most

serious nature. But even if such a warrant could be justified in a remote desert area near the border where numerous aliens are surreptitiously entering the United States and few other persons are likely to be found, it is an intolerable infringement of the Constitutional rights of millions of persons to issue such a warrant for searches on a highway where lawful motorists outnumber vehicles transporting allegedly illegal aliens by a ratio of one thousand to one.

The Government's brief repeatedly suggests that an area warrant is *more* justified along Interstate 5 near San Clemente than in the remote area where the *Almeida-Sanchez* fact situation arose. However, all logic suggests that, using Justice Powell's guidelines as he illustrated them, such a general warrant would be infinitely *less* appropriate on the major artery between two American metropolitan centers where the proportion of vehicles containing suspected illegal aliens is a fraction of one per cent.

C. An Analysis of the Data Submitted by the Government to Justify the "Warrant of Inspection" Clearly Demonstrates That the San Clemente Checkpoint Is an Inefficient and Constitutionally Unreasonable Tool of Law Enforcement, One That Intrudes Upon the Fourth Amendment's Guarantees to Millions of Persons Annually Without Significantly Aiding the Government in Achieving Its Legitimate Goal of Excluding Illegal Aliens.

"The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation,

and particularly describing the place to be searched, and the persons or things to be seized." (emphasis added) *Fourth Amendment, United States Constitution.*

The word "unreasonable" as used in the *Fourth Amendment* to the *United States Constitution* can have no meaning without a thorough analysis of all of the facts and circumstances involved in the search and seizure in question. The following is an analysis of the statistics as provided by the Government, which, on their face, show patent unreasonableness.

Using only the statistics provided by the Border Patrol in its effort to justify the operation of the San Clemente checkpoint, it is apparent that the checkpoint is an incredibly ineffective tool of immigration law enforcement and a constitutionally unreasonable use of the Border Patrol's limited resources.

According to the Affidavit in support of the June 22, 1974, warrant, the Border Patrol apprehended a total of 16,893 allegedly illegal aliens during calendar year 1973 at the San Clemente checkpoint. For comparison, the *1973 Annual Report of the Immigration and Naturalization Service,* cited at 51 *Interpreter Releases* 94, indicates that the Immigration and Naturalization Service apprehended a total of 655,968 suspected illegal aliens in the United States last year, 88 per cent or 576,823 of them Mexican nationals.

In Mr. McCord's affidavit (A. 45-49), the Border Patrol indicates that some 40,000 suspected illegal aliens a month are estimated entering the United States through the Chula Vista sector of responsibility alone, an annual total of about 480,000. Of these, the affidavit indicates 95 per cent are bound for jobs in Los Angeles

or in the San Joaquin Valley; approximately 70 per cent of all suspected illegal aliens "traverse" Interstate Highway 5.

Again applying these Government figures to the question of the San Clemente checkpoint's reasonable practical value, the results are alarming. If 480,000 suspected aliens enter California alone each year, and 95 per cent of them are destined for jobs in Los Angeles or points north, that means some 456,000 suspected aliens are headed north from San Diego or Imperial Counties. It means that 70% of them, or 319,000 illegal aliens will "traverse" Interstate 5 each year.

If, as the Government contends, the San Clemente checkpoint is the Government's cornerstone of the checkpoint system which acts as a secondary line of defense against the penetration of illegal aliens into the interior of the United States (Brief for Pet. 49), the Government's own data indicates a frighteningly poor success rate. If less than 17,000 allegedly illegal aliens were apprehended in 1973 at San Clemente, out of the estimated 319,000 who travelled north by that route, 95 per cent escaped detection at San Clemente.

An explanation for the failure of the San Clemente checkpoint to detect and apprehend a greater number of illegal aliens en route north is also offered in Mr. McCord's affidavit, which states (on pp. 4-5 thereof):

> 14. We are unable to maintain the checkpoint in operation continuously because of safety factors that deteriorate because of inclement weather and traffic in excess of 2,500 cars per hour. We are

also unable to maintain the checkpoint because of limitations in manpower available for assignment as well as the basic allocation to that function. The checkpoint is in operation approximately 60% of the time during the year.

15. Smugglers of aliens and those aliens travelling with prior knowledge of the checkpoint customarily wait for the checkpoint to become inactive, for any of the above reasons, before attempting to continue up the highway. This again demonstrates the deterrent effect which the checkpoints have on the traffic in illegal aliens.

Contrary to Mr. McCord's conclusion just cited, the fact that the checkpoint is shut down nearly half the time, particularly during peak traffic periods when other law enforcement officers are least likely to notice carloads of aliens, may explain why the San Clemente checkpoint is not an effective deterrent to the movement of allegedly illegal aliens northward.

Nevertheless, while the checkpoint only reduces the flow of illegal aliens to the north by about 5%, it permits the Border Patrol to stop and cursorily examine thousands of cars driven by millions of law-abiding citizens and legal resident aliens each year without any pretext of probable cause or even founded suspicion. These conclusions are disturbing, yet they are clearly supported by the Border Patrol's own data, data intended to justify the operation of the San Clemente checkpoint.

Another aspect of the government's data is a strong suggestion that, while the Border Patrol is under close judicial scrutiny, it is either modifying its enforcement practices or modifying its reporting of the data.

On page two of Mr. McCord's affidavit of June 22, 1974, in support of the "Warrant of Inspection", he states:

> "At the traffic checkpoint located south of San Clemente, California, we stop approximately 50 vehicles during each hour of operation for limited inspection consisting of inquiring of the occupants of the vehicle as to their citizenship status. The average car is detained for questioning of the occupants approximately three to five minutes."

However, the July 1, 1974, affidavit of Mr. Gene Harris, who is Patrol Agent in Charge at the San Clemente checkpoint, presents another picture [Ex. A, A. 54 *et seq.*]. Exhibit A shows that, during the first eight days of the June 22, warrant of inspection, 145,960 cars passed through the checkpoint, but only 820 were stopped for questioning during that entire period (124 hours and ten minutes of operating time). If Mr. McCord's figures are correct, and his figure of an average 1,200 cars passing through the checkpoint per hour closely correlates with the total of 146,000 cars in 124 hours, the patrol should have been expected to detain more than 6,000 cars for questioning (50 times 124 hours), not the mere 800 reported.

In any event, the overall conclusion that must be drawn from a review of the data provided by the Government itself on the operation of the San Clemente checkpoint is that it is an unreasonable infringement on the liberty of thousand of persons engaged in legitimate activities, with *de minimus* effectiveness towards its declared purpose.

V.
CONCLUSION.

For the foregoing reasons the Los Angeles County Bar Association as Amicus Curiae respectfully submits that the trial court erred in denying the defendant's motion for suppression of evidence and in upholding Magistrate Infante's warrant of inspection, and that the judgment of the Court of Appeals for the Ninth Circuit was correct.

Respectfully submitted,

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